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No. 539

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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OVERSEAS AIRLINES, INC., RALPH W. E. COX, JR., R. W. E. COX, LETITIA COX, co-partners doing business as Ocean Air Tradeways; and RALPH COX, JR., LETITIA H. COX, REBEKAH L. McSWEENEY and ANDREW L. COX, a partnership, doing business under the firm name and style of OCEAN AIR TRADEWAYS,

Plaintiffs-Appellants,

against

COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA, S.A., AEROVIAS VENEZUELA EUROPA and JORGE MARCANO,

Defendants-Appellees.

ON APPEAL FROM JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO APPELLANTS' BRIEF

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Docket Entries.

FILINGS—PROCEEDINGS

Month	Day	Year	
1	23	52	Filed removal record from Supreme Court, New York County.
1	24	52	Filed Notice of Removal.
1	24	52	Filed removal bond—Seaboard Surety Co.
2	11	52	Filed Stip. and Order extending time to answer to 2/18/52, Murphy, J.
D2	11	52	Filed Answer of Defts.
P2	28	52	Filed Stip. and Order substituting Atty. for Pltf.
			Mailed Notice of Entry 2/29/52.
2	29	52	Filed Stip. and Order extending time to reply to 3/17/52. McGohey, J.
2	29	52	Filed Stip. and Order adjourning deposition of U. S. Overseas Airlines to 3/19/52. McGohey, J.
P3	5	52	Filed Notice of Issue for Trial (non-jury).
3	25	52	Filed Reply to Defts. Counterclaim.
4	1	52	Filed notice to take deposition of defendant Marcano, et al.
9	10	52	Filed notice of taking deposition of Clemett.
9	10	52	Filed notice of taking of deposition of Lloyd Webb.
12	10	53	Filed Stip. and Order substituting attorney for plaintiff. Mailed Notice of Entry 12/11/53.

Docket Entries.

Month	*Day*	*Year*	
11	22	54	Filed Notice of Motion to adjourn case—Memo. End. (dated 11/19/54). Adjourn this case to foot of Day Cal. for 2/28/55, Knox, Ch. J.
2	28	55	Filed Notice of Motion to adjourn case—Memo. End. (dated 2/25/55). Adjourn this case to foot of Day Cal. for 4/55 Term, Knox, Ch. J.
4	6	55	Filed affidavit of adjournment.
5	17	55	Filed affidavit of adjournment.
D9	3	55	Filed Notice of non-readiness for trial.
11	9	55	Filed amended complaint.
11	9	55	Pre-trial before Kaufman, J. Ajd. to 11/30/55.
D11	25	55	Filed answer of defendants.
11	30	55	Filed transfer of record of proceedings of 11/9/55.
12	1	55	Filed Pre-trial Order, Kaufman, J.
12	12	55	Filed Notice to Produce at Trial.
12	14	55	Filed Plaintiffs' amended reply to answer.
1	10	56	Filed letter from HSR&N to Judge Weinfeld re: Special Calendar—Memo. End. (dated 1/6/56 by Cal. Commr.). Placed at foot of Ready Cal. for 1/9/56.
6	7	56	Filed Stip. re testimony of Herbert Goldberg.
6	6	56	Pre-Trial before Edelstein, J. concluded.
6	18	56	Trial begun, before Palmieri, J.

Docket Entries.

Month	*Day*	*Year*	
6	19	56	Trial continued.
6	20	56	Trial Continued.
6	21	56	Trial Continued.
6	22	56	Trial Continued.
6	25	56	Trial Continued.
6	26	56	Trial Continued.
6	27	56	Trial Concluded. Decision Reserved.
8	30	56	Filed Opinion #22,895. Defts. are entitled to judgment (see Opinion). Findings of Fact and Conclusions of Law are filed herewith. Submit judgment, Palmieri, J.
8	30	56	Filed plaintiffs' proposed findings and conclusions.
8	30	56	Filed defendants' Index of Exhibits.
8	30	56	Filed affidavit of service of Memorandum and defendants' Index of Exhibits.
8	30	56	Filed Table of Contents and Findings of Fact and Conclusions of Law, Palmieri, J.
9	11	56	Filed bill of costs taxed at $1,068.36.
P9	12	56	Filed affidavit of Schoenwald in opp. to defendants' application for bill of costs.
9	14	56	Filed Notice of Appeal. Mailed copy to HSR&N.
9	7	56	Filed Judgment No. 61,130 favor of defendants for sum of $153,234.53, plus interest from 9/15/51, with costs taxed at $1,068.36. Palmieri, J. Mailed Notice of Entry 9/18/56.

Docket Entries.

Month	*Day*	*Year*	
P9	20	56	Filed Notice of Appeal and on 9/20/56 mailed copy to Maurice L. Schoenwald.
P10	1	56	Filed Appeal Costs Bond—Fidelity & Deposit Company of Maryland, Baltimore.
10	3	56	Filed affidavit and order extending plaintiffs' time to file record on appeal to 12/1/56—McGohey, J. Mailed Notice of Entry 10/4/56.
10	3	56	Filed Amended Notice of Appeal (mailed copy to Hale SR&N 10/4/56).
11	1	56	Filed Consent Order for substitution of attorneys of plaintiffs.
11	26	56	Filed transcript of record of proceedings of June 15, 19, 20—1956.
11	26	56	Filed transcript of record of proceedings of June 21, 22, 25, 27—1956.
11	30	56	Filed Stip. Re that papers indicated be made part of record on appeal.
11	30	56	Filed deposition of Alep de Cervera.
11	30	56	Filed opinion on Venezuelan Law by Dr. Tenorio and translation.
11	30	56	Filed deposition of Fremont W. Burger.
11	30	56	Filed depositions of Lloyd Webb and Earl W. Clemett.
11	30	56	Filed Stip. that exhibits admitted be included in record on appeal.

(1442)

Findings of Fact and Conclusions of Law.

C. A. No. 72-376

A. FINDINGS OF FACT

I. The Parties

1. Defendant Compania Aerea Viajes Expresos de Venezuela, S.A. (herein called "CAVE") was and is a corporation duly organized and existing under the laws of the Republic of Venezuela. Aerovias Venezuela Europa (herein called "AVE") was and is the international division of CAVE. Defendant Jorge Marcano was and is a citizen and resident of the Republic of Venezuela (alleged in Paargraph 15 of counterclaim and not denied in reply).

2. Plaintiff United States Overseas Airlines, Inc. (herein called "USOA") was and is a corporation organized and existing under the laws of the State of Delaware. The individual plaintiffs are citizens and residents of the State of New Jersey (1443) (alleged in Paragraph 16 of counterclaim and not denied in reply.)

II. CAVE'S Franchise

3. On July 25, 1951, CAVE was the holder of a franchise granted by the Venezuelan Government to exploit air transportation between Venezuela and points in Europe (Def. Ex. N, BJ).

III. Agreement Between CAVE and Plaintiffs

4. On July 25, 1951 defendants and plaintiffs entered into a written agreement for the conduct under the franchise of certain air transportation between Venezuela and Europe for a period of one year (Def. Ex. N).

IV. Alleged False Representations and Conspiracy

5. Defendants made no false or fraudulent representations of fact to plaintiffs and did not conceal any material facts from plaintiffs in order to induce plaintiffs to enter into the agreement (Testimony of Marshall; Deposition of Burger; Pl. Ex. 357).

6. Plaintiffs made independent investigations of fact in order to determine whether they should enter into the agreement, and did not rely on representations made by defendants (Depositions of Burger, Cox, Webb and Clemett; Def. Ex. BQ, C, D, E, F, BR, O and P).

(1445) 7. Defendants did not conspire (a) to induce plaintiffs by misrepresentations to enter into the agreement, (b) to convert plaintiffs' aircraft, or (c) to obtain by stealth documents proving plaintiffs' ownership of the aircraft (Testimony of Marcano and Marshall; Depositions of Webb and Burger).

V. Breach by Plaintiffs

8. Pursuant to the agreement of July 25, 1951, plaintiffs were required, among other things, for a period of one year, to furnish two DC-4 aircraft for Venezuelan registry, to conduct certain flight operations and traffic functions, and to fly a scheduled service between Venezuela and Europe commencing no later than August 15, 1951 (Def. Ex. N).

9. On August 19, 1951, plaintiffs furnished one DC-4 aircraft, United States registry number N90436, which was placed under Venezuelan registry, and plaintiffs flew one trip from Venezuela to Europe on August 19, 1951,

one trip from Europe to Venezuela on September 9, 1951, and one trip from Venezuela to Europe on September 13, 1951. Thereafter plaintiffs refused to make further flights (Testimony of Marcano; Deposition of Cox).

10. On or about September 8, 1951, plaintiff Cox, the president of USOA, directed Lloyd Webb, a vice president of USOA, to go to Venezuela and take the aircraft off the CAVE operations and bring it back to the United States (Depositions of Webb and Burger).

(1445) 11. Plaintiff Cox told Webb that Cox wished the aircraft taken off the CAVE operations because "It didn't look like so much money was going to be made and he thought he would make more money on the Korean airlift" (Deposition of Webb).

12. Webb did not bring the aircraft back to the United States, being persuaded by Burger, the employee of USOA whom plaintiffs made general manager of the operations under the agreement (Def. Ex. Q), that the potential of the operations was so tremendous (Deposition of Burger).

13. On Friday, September 14, 1951 plaintiffs and defendants met in New York, and plaintiff Cox told defendants that plaintiffs would refuse to abide by the agreement of July 25, 1951, and would not conduct the operations under the agreement unless "full loads" were obtained (Testimony of Marcano, Marshall and Cox).

14. At the request of Cox the meeting of Friday, September 14, 1951 was adjourned to the following day, ostensibly to enable Cox to have a lawyer present to represent plaintiffs (Testimony of Marcano and Marshall).

15. The same day, September 14, 1951, USOA made application to re-register under United States registry the

aircraft then under Venezuelan registry and "forwarded to the Chief, Aircraft Records Section, Civil Aeronautics Administration" in Washington, D. C., "Part A, Form ACA-500 and legal evidence (1446) of ownership" of the aircraft previously registered N90436. USOA stated in its application for re-registration that the "aircraft is not registered under the laws of any foreign country" (Def. Ex. CD).

16. On Saturday, September 15, 1951, plaintiffs and defendants met again in New York. Cox stated that "as far as we are concerned, the contract is done; we are pulling out; and we have nothing more to do with it" (Deposition of Cox).

17. At the meeting of Saturday, September 15, 1951, Russell, on behalf of defendants, stated that the franchise would be in jeopardy if operations were discontinued, that defendants would, for 90 days, suspend collection of the $3,000 per week guaranteed defendants as a minimum under the July 25, 1951 agreement, provided plaintiffs expended a like amount to promote traffic, that if operations did not show a profit at the close of the 90 days, defendants would waive collection of the 90 days guarantee, and that if operations showed a profit at the close of 90 days, arrangements would be made for payment of such guarantee (Testimony of Russell, Marcano and Marshall).

18. Cox purported to agree in principle to the proposal of defendants, assured them that the flight scheduled to leave Rome that night, Saturday, September 15, 1951, would go out as scheduled, and stated that the attorneys for both parties should meet on Monday, September 17, 1951, to formulate the (1447) details of the agreement (Testimony of Russell, Marcano and Marshall).

19. In fact, on September 15, 1951, Cox had telephoned the pilot of the aircraft, Paul Campus, in Rome, and told him to take it off the CAVE operations and fly it to Germany. The aircraft was then flown to Germany (Testimony of Cox and Russell).

20. On Sunday, September 16, 1951, Russell, having heard that the aircraft had been taken off the operations, called Cox (after having tried unsuccessfully to reach USOA's attorney, Doherty). Cox admitted that the plane had been withdrawn from the operations and admitted that passengers and Venezuelan crews in Europe had been left stranded (Testimony of Russell).

21. On Monday, September 17, 1951, John Marshall, as attorney for CAVE, mailed a letter dated September 17, 1951 to USOA, reciting that plaintiffs had failed to satisfy their obligations under the agreement of July 25, 1951 and had "further expressed unwillingness to so perform," and stating further that as a result CAVE wished to exercise the option provided for in paragraph 1) I) of the agreement for the purchase of two DC-4 aircraft (Def. Ex. AY).

VI. Fulfillment by CAVE of Its Obligations under Agreement

22. Under the agreement dated July 25, 1951, paragraph (1448) 2) B), CAVE's responsibility to plaintiffs was to "maintain arrangements for traffic and landing rights, assist in the negotiations of government contracts, take such actions as may be necessary in connection with continuing the franchise concerned and furthering diplomatic relations of consequence thereto" (Def. Ex. N).

Findings of Fact and Conclusions of Law.

(a) *Continuing the Franchise*

23. CAVE took such action as was necessary to continue the franchise to operate from Venezuela to Europe, and the franchise was renewed for the one year period during which the agreement of July 25, 1951 was to continue in force (Def. Ex. BN).

(b) *Landing and Traffic Rights in Bermuda, Spain, France and Italy*

24. When plaintiffs started to operate the route from Venezuela to Europe on August 19, 1951, CAVE had full landing and traffic rights in Bermuda (Def. Ex. BF), Spain (Def. Ex. BD), France (Def. Ex. BD) and Italy (Def. Ex. BD, BE and Pl. Ex. 242).

25. Burger, who had been appointed by USOA as its general manager of the CAVE operation (Def. Ex. Q), went to Rome in the middle of August, 1951. He reported to Marcano in Rome on or about August 26, 1951 that Alitalia, an Italian airline, partially owned by the Italian Government, wished CAVE to "reduce" its flights from Rome from two per week to one per week. Marcano explained to Burger that CAVE had rights for two flights (1449) per week, that Alitalia had in 1950 made a similar suggestion, and that Alitalia did not persist when Marcano told Alitalia that if it did so he would arrange to limit Alitalia's passengers from Caracas (Testimony of Marcano).

26. Nevertheless, Burger told Marcano that Burger believed that more traffic would be obtained if one flight a week were originated in Germany and one flight a week in Rome, rather than two flights a week in Rome (Testimony of Marcano).

27. At Burger's request Marcano signed an interline agreement with Alitalia (also initialed by Burger) whereby CAVE and Alitalia would each fly one trip a week from Rome to Caracas, and CAVE would fly one trip a week from Germany to Caracas exchanging passengers at Lisbon with Alitalia's one trip a week from Rome to the south of South America. The interline agreement was cancellable by either party on thirty days' notice (Testimony of Marcano; Def. Ex. AR).

28. CAVE had landing and traffic rights for two trips per week from Rome, and the voluntary agreement with Alitalia was signed by Marcano at Burger's express request and in the belief, after discussion with Burger, that the operation would thereby be more profitable (Testimony of Marcano).

29. CAVE did not relinquish the rights from the Italian Government to make two flights per week from Rome (Testimony of Marcano).

(1450) (c) *Landing and Traffic Rights in Portugal*

30. CAVE took action to request renewal of landing and traffic rights in Lisbon, Portugal, and the Department of Foreign Affairs of Venezuela requested such renewal no later than August 17, 1951 (Def. Ex. BD).

31. Cox testified that it was not contemplated at the inception of the operation on August 19, 1951 "to use Portugal as a passenger or a traffic stop," but merely as a "fuel stop" (Deposition of Cox).

32. On September 8, 1951, the landing and traffic rights in Lisbon, Portugal were renewed (Def. Ex. BD). This

was a tardy compliance with the contract as the defendants were responsible for maintaining these rights in force as of July 25, 1951, the contract date.

34. At the time of the meetings between defendants and plaintiffs in New York on September 14, 1951, and September 15, 1951 all rights, including those in Portugal, were fully in order (Def. Ex. BD).

35. At the meetings between defendants and plaintiffs in New York on September 14, 1951 and September 15, 1951, plaintiffs did not complain that landing and traffic rights were not in order, but only that plaintiffs did not have "full loads" (Testimony of Cox, Russell, Marcano and Marshall).

(1451) (d) *Furthering Diplomatic Relations*

36. CAVE and Marcano took such actions as were necessary in connection with "furthering diplomatic relations of consequence" to the franchise (Testimony of Marcano).

37. On August 22, 1951, Marcano received from Cox a cable reading: "Urgent you meet me Rome immediately. Departing Newark tomorrow" (Def. Ex. AI).

38. Immediately Marcano obtained from the Director General of the Foreign Relations Department of Venezuela a letter to the Venezuelan Ambassador in Rome, informing him of the importance of CAVE to Venezuela and requesting him to try to solve any problems that might arise for CAVE (Def. Ex. AM).

39. Marcano also immediately prepared in Caracas a power of attorney which Burger had requested for the appointment of a representative before the Italian immigration department (Testimony of Marcano).

40. Marcano then left for Rome, arriving there on August 25, 1951. Cox did not go to Rome (Testimony of Marcano and Cox).

41. After talking to Burger in Rome, Marcano conferred with the Venezuelan Ambassador in Rome and obtained assurances of cooperation with CAVE (Testimony of Marcano; Deposition of Burger).

(1452) 42. Marcano also conferred with the Venezuelan immigration attache in Rome, Ramirez Torres, and received assurances of cooperation with CAVE (Testimony of Marcano).

43. Thereafter USOA and CAVE received full cooperation from the Venezuelan officials in Italy (Deposition of Burger; Testimony of Marcano).

44. Burger's testimony was, not only that Marcano was thoroughly honest, but that he cooperated completely with the USOA personnel in Europe (Deposition of Burger).

VII. Alleged "Mutual Mistake"

45. The agreement dated July 25, 1951 was not entered into while the parties were laboring under a mutual mistake of fact. The agreement was itself amended at the request of Cox to postpone the minimum guarantees of $3,000 per week to be paid by USOA to CAVE for sixty days so as to commence September 23, 1951, so that plain-

tiffs did not expect to have sufficient traffic to fly two round trips per week at least until September 23, 1951 (Def. Ex. M, N; Testimony of Marshall).

46. Plaintiffs also did not expect "full loads" on the trips. The agreement of July 25, 1951 contemplated the possibility of overall load factors of less than 50%, in providing that Marcano was to be paid a salary "subject to the attainment of an average annual load factor of not less than (1453) 50 per cent" (Def. Ex. N; Testimony of Marshall and Gotch).

47. Plaintiffs could not reasonably have anticipated immediate "full loads" in the light of the statement in the Gotch and Crawford study that "as soon as AVE can establish schedule dependability, a satisfactory standard of passenger service, and conduct an aggressive promotional campaign" it should attain an overall load factor of 61% (Pl. Ex. 357).

48. A scheduled air operation which had been shut down, as CAVE's service was, for more than three and one-half months, required some time to reestablish itself (Testimony of Gotch and Marcano).

49. Plaintiffs had had considerable experience in air transportation and could not reasonably have anticipated overall load factors of even 61% before establishing schedule dependability and a satisfactory standard of passenger service and before conducting an aggressive promotional campaign (Testimony of Cox; Pl. Ex. 357).

50. The first and only flight made by plaintiffs under the agreement from Europe to Caracas, i.e., on September 9, 1951, carried thirty-nine passengers, a 78% load factor (Testimony of Marcano).

51. Burger, USOA's general manager who was in Europe and had a first-hand opportunity to assess the traffic potential (1454) of the operations, was highly enthusiastic as to future traffic. Burger so expressed himself to plaintiffs and to CAVE on returning from Europe on September 9, 1951 (Testimony of Marcano and Marshall; Depositions of Burger and Webb).

52. Burger told Webb that "the potentialities were tremendous," and it was only "due to misfortune," such as a bus breaking down with "a load of passengers," that prevented the load on the trip of September 9, 1951 from being larger (Deposition of Webb).

53. Burger told Webb specifically of "the potentialities of the tremendous passenger traffic from Rome" (Deposition of Webb).

VIII. Alleged Illegality Under Venezuelan Law

55. The franchise of CAVE consisted of a contract between the Federal Executive of Venezuela and CAVE dated July 30, 1950, and gave CAVE the right to exploit air transportation within Venezuela, and, with previous authorization of the Federal Executive, outside Venezuela. The duration of the contract was one year, "to be extended at the option of the (1455) Federal Executive, the Contractor being obliged to accomplish regularly the flights which it has undertaken" (Def. Ex. BJ).

56. In 1950 and 1951 the government of Venezuela was that of a Military Junta, which held all executive and legislative functions. There was no Congress (Testimony of Tenorio and Marcano).

57. By letter dated July 30, 1951 to the Minister of Communications of Venezuela, CAVE fairly summarized the agreement between CAVE and plaintiffs dated July 25, 1951. The letter recited that USOA "associates itself with CAVE," that USOA is "supplying two aircraft DC-4s" and "also agreeing to furnish the working capital needed and all technical help needed by CAVE," that USOA had agreed to train Venezuelan personnel so that in a year all executive functions might be assumed by Venezuelans, and that USOA would have an option to purchase up to 40% of CAVE's stock (Def. Ex. BL).

58. By letter dated August 14, 1951 to the Director of Civil Aeronautics, CAVE gave further details as to its arrangements with plaintiffs, and stated the capital and shareholders of CAVE, that the "only risk" to CAVE would be with respect to the aircraft (which was registered in CAVE's name and therefore its risk, but to which a return bill of sale had been given to USOA as security) which was to be held on credit from USOA (because of the return bill of sale and the option to CAVE to purchase), that the personnel of the company, (1456) except the traffic manager, chief of operations and chief of communications and "those whom it will not be possible to obtain in Venezuela" will be Venezuelan. Marcano also orally advised the Venezuelan Ministry of Communications of the details of CAVE's agreement with plaintiffs (Def. Ex. BM; Testimony of Marcano).

59. On the operation pursuant to the July 25, 1951 agreement all co-pilots and radio operators were Venezuelan. The stewardesses were either Venezuelan or residents of Venezuela, it being impossible to obtain Venezuelans who spoke all the necessary languages. In addition, certain other administrative and technical personnel were Venezuelan (Testimony of Marcano).

60. After receiving the letters dated July 30, 1951 and August 14, 1951, and the oral information from Marcano, the Ministry of Communications of Venezuela renewed the franchise of CAVE and requested the Ministry of Foreign Relations to obtain the requisite landing and traffic rights (Def. Ex. BN).

61. Only the Federal Executive of Venezuela had standing to prevent plaintiffs from making flights pursuant to the agreement with CAVE dated July 25, 1951, and the Federal Executive of Venezuela did not do so (Testimony of Tenorio and Marcano).

62. The renewal of the franchise by the Federal Executive of Venezuela after receiving from CAVE the letters (1457) dated July 30, 1951 and August 14, 1951 and the oral informatio. from Marcano, was a practical construction that the franchise and the law of Venezuela did not prohibit CAVE from making the agreement with plaintiffs dated July 25, 1951 and did not prohibit the acquisition by plaintiffs of CAVE's stock (Testimony of Tenorio).

63. Under Venezuelan law the agreement of July 25, 1951 did not accomplish a transfer of the rights and obligations of CAVE under the franchise (Testimony of Tenorio).

64. Under Venezuelan law the significant criterion in determining whether a transfer of rights and obligations under the franchise was made is whether control of the franchise rights was taken from CAVE, and the agreement between plaintiffs and CAVE dated July 25, 1951 keeps control in CAVE of "matters of policy and questions of major concern," and also reserves to CAVE con-

trol not only of "hiring" and "termination" of "all personnel" but also the "management" of "all personnel" (Testimony of Tenorio).

65. Plaintiffs never exercised the option under the agreement of July 25, 1951 to purchase CAVE's stock (Testimony of Marcano).

66. Under Venezuelan law and the franchise USOA was not prohibited from acquiring stock in CAVE (Testimony of Tenorio).

67. In 1950, CAVE had entered into agreement with two (1458) United States corporations, Flying Tiger Line, Inc. and Near East Air Transport, Inc., whereby they undertook to conduct operations for CAVE and acquired 45% of CAVE's stock. The Federal Executive of Venezuela was fully informed of CAVE's arrangements with these corporations, and made no objection thereto (Testimony of Marcano).

IX. Loss of Franchise and Foreseeability Thereof Upon Breach by USOA

69. The Ministry of Communications, by letter dated August 6, 1952, stated that it would have no objection to renewing CAVE's permit provided that CAVE could show that it had rendered "regularly air transportation services" and had complied with the technical requirements of the Venezuelan Board of Aeronautics (Def. Ex. BP).

70. Since CAVE was unable to make the showing required, it lost the franchise to Linea Aeropostal Venezolana (Testimony of Marcano).

(1459) 72. At the time that the agreement of July 25, 1951 was entered into, plaintiffs knew that service over the CAVE franchise had been suspended on May 1, 1951 (Testimony of Cox and Marshall; Def. Ex. N; Pl. Ex. 357), and that unless the service was renewed the CAVE franchise was in jeopardy (Testimony of Cox and Marshall).

73. Plaintiffs knew that equipment to operate the franchise was very scarce in September, 1951 due to the Korean war and increased air transportation. (Testimony of Cox).

74. Plaintiffs were told by Russell in the meeting of September 15, 1951, that a failure to continue the operations would place the franchise in jeopardy (Testimony of Russell).

X. Damages

75. The agreement of July 25, 1951 required plaintiffs, among other things, to pay to CAVE (a) $1,500 per round trip flown, and beginning September 23, 1951 a minimum guarantee of $3,000 per week, (b) all costs, both direct and indirect, and (c) the actual business expenses of Marcano (Def. Ex. N).

(a) *$3,000 Per Week Guarantee*

76. During the one year term of the agreement of July 25, 1951, plaintiffs were required to pay a minimum guarantee of $3,000 a week to CAVE, commencing September 23, 1951, or a total of $132,000 (Def. Ex. N).

(1460) (b) *Out-of-Pocket CAVE Expenses*

77. CAVE expended the following sums in connection with the operations under the agreement of July 25, 1951:

1.	Gasoline and oil	$ 8,440.53
2.	Expenses of USOA personnel	1,247.10
3.	Ground handling, transportation and meals in Caracas, Lisbon and Madrid	1,485.78
4.	Landing fees	139.32
5.	Electricity, telephone and telegrams	2,001.94
6.	Advertising	1,063.06
7.	Stationery	180.72
8.	Salaries to crew and administrative personnel	12,086.21
9.	General office expenses:	
	Caracas	341.97
	Madrid	30.81
	Rome	4,456.70
10.	Expenses of Coe and Clerici, General Agent appointed by USOA in Rome	2,301.91
11.	Expenses to return passengers with round trip tickets stranded by USOA in Europe	517.15
12.	Utensils and flight equipment turned over to USOA	405.00
13.	Marcano transportation to Rome	525.00
14.	Marcano expenses in Rome	420.00
		$35,643.20

CAVE received net revenues from passengers and mail from the operation of $12,080.53, leaving a total out-of-pocket expense to CAVE of $23,562.67, which was rounded off in the testimony of Marcano to $20,000 (Testimony of Marcano, referring to Def. (1461) Ex. CF for id.).

78. CAVE also was billed for expenses of Marshall in the sum of $1,234.53 (Def. Ex. BX, Testimony of Marshall).

(c) *Loss of Franchise*

81. By letter dated June 21, 1950, CAVE had been informed by the Venezuelan Ministry of Communications that when CAVE had organized "its maintenance and communications services (1462) better" a five year franchise would be considered (Def. Ex BI).

82. Venezuela has continued since 1951 its great expansion and public works program (Testimony of Marcano).

83. Since 1951 immigration from Europe into Venezuela has been far in excess of the amount predicated by the Gotch and Crawford study, and has increased each year (Pl. Ex. 357; Testimony of Marcano).

84. Burger, USOA's general manager for the CAVE operation, was personally in Europe for almost one month prior to September 10, 1951, working on traffic matters. He observed personally on behalf of USOA the traffic conditions. He had no interest to exaggerate to USOA the potentiality of future traffic (Depositions of Burger and Webb; Testimony of Marcano).

85. Burger was consistently enthusiastic in reporting to USOA that the operation had tremendous potential (Testimony of Marcano, Russell and Marshall; Depositions of Burger and Webb).

87. The failure to have Lisbon traffic rights prior (1463) to September 8, 1951 did not cause plaintiffs to lose more than $2,250 of revenue, and defendants have given recognition to such possible loss by waiving $2,250 due under the agreement of July 25, 1951 to CAVE for the one and one-half round trips actually flown by USOA.

88. Plaintiffs made no showing that they had obtained or done anything to obtain passengers from Lisbon to Caracas for the westbound flight of September 9, 1951 (Deposition of Burger), and Cox testified that Lisbon was contemplated on the initial flights as a fuel stop and not a passenger stop (Deposition of Cox).

89. In the prior operation of the route by CAVE less than fifteen per cent of the westbound traffic came from Lisbon (Pl. Ex. 357).

(e) Exercise of Option to Purchase Two DC-4 Aircraft

90. Under the agreement of July 25, 1951, defendants had an option to purchase two of plaintiffs' DC-4 aircraft at a price of $500,000 each (Def. Ex. N).

(1464) 94. Burger stated in a memorandum for Cox dated August 24, 1951, that DC-4 aircraft "are not obtainable even at" $500,000 each (Pl. Ex. 242).

95. The market value of DC-4 aircraft continued to rise after May, 1951, and July, 1951 (Testimony of Wold; Deposition of Cox).

96. The plaintiffs and the defendants intended the option clause "1 1" at page 3 of their agreement of July

25, 1951 to be operative only in the event that the defendants were to use the aircraft therein referred to in the operation of the routes of the CAVE franchise, and after any eventual relinquishment thereof by the plaintiffs during the contract period. In purporting to exercise said option the defendants had no intention to use these aircraft on the routes of the CAVE franchise but intended to buy them for immediate resale. The defendants did not have the financial means with which to conduct operation of these routes, to purchase these aircraft, nor the intention to operate them on the said routes, at the time they purported to exercise the said option.

(1465) B. Conclusions of Law

1. The Court has jurisdiction over the subject matter of the action.

2. The Court has jurisdiction over the parties to the action.

3. The written agreement of July 25, 1951 is valid and binding upon plaintiffs and defendants.

5. Plaintiffs had, and failed to sustain, the burden of proving that the agreement was illegal or void. (1466) *Adams-Mitchell Co.* v. *Cambridge Distributing Co.*, 189 F. 2d 913, 916 (2d Cir. 1951).

6. Defendants were not guilty of any fraud or misrepresentation or conspiracy to induce the agreement.

7. Plaintiffs had, and failed to sustain, the burden of showing fraud or misrepresentation by clear, convincing

and unequivocal evidence. *Public Motor Service* v. *Standard Oil Company of New Jersey,* 99 F. 2d 124, 126 (D. C. Cir. 1938).

8. Plaintiffs' claim for fraud and misrepresentation cannot be based on estimates, opinions or predictions as to the future. *D. C. Land & Bldg. Co.* v. *McMerney,* 64 F. 2d 554, 555 (D. C. Cir. 1933); *United States* v. *Stanolind Crude Oil Purchasing Co.,* 113 F. 2d 194, 201 (10th Cir. 1940).

9. Plaintiffs had, and failed to sustain, the burden of showing reliance on statements of defendants in inducing the agreement. *McNabb* v. *Thomas,* 190 F. 2d 608 (D. C. Cir. 1951), cert. den. 342 U. S. 859 (1951); *Imperial Assur. Co.* v. *Joseph Supornick & Son,* 184 F. 2d 930, 934-935 (8th Cir. 1950); *Twachtman* v. *Connelly,* 196 F. 2d 501, 506 (6th Cir. 1939).

10. Defendants substantially fulfilled their obligations under the agreement.

11. Landing and traffic rights for Lisbon were not renewed until September 8, 1951, one day prior to the one and only return trip made by plaintiffs from Europe on September 9, 1951 (1467), and such lack of renewal was due in part to the fault of defendants.

12. Even if plaintiffs presupposed that the Lisbon landing and traffic rights would be renewed prior to September 8, 1951, such lack of renewal prior to that date does not give plaintiffs the right to rescind the agreement. *Pasquel* v. *Owen,* 186 F. 2d 263, 270 (8th Cir. 1950); *United States Plywood Corp.* v. *Hudson Lumber Co.,* 113 F. S. 529, 534 (S.D.N.Y. 1953), appeal dism. 210 F. 2d

462 (1954); *Arrow Petroleum Co.* v. *Johnston*, 162 F. 2d 269, 276 (7th Cir. 1947).

13. The lack of renewal of the Lisbon landing and traffic rights prior to September 8, 1951 did not cause a loss to plaintiffs of more than $2,250 in revenue.

14. Defendants have been damaged by plaintiffs' failure to pay $1,500 per round trip flown and a minimum guarantee of $3,000 a week commencing September 23, 1951, or a total of $134,250, of which amount defendants have not claimed $2,250, to give recognition to the fact that the Lisbon landing and traffic rights were not renewed until September 8, 1951.

15. Defendants have been damaged in the amount of $21,234.53 by the failure of plaintiffs to pay out-of-pocket expenses to defendants.

(1468) 17. Defendants had, and failed to sustain, the burden of proving a causal relationship between the acts of the plaintiffs and the cancellation of the franchise rights of CAVE by the Venezuelan Government.

18. Defendants had, and have failed to sustain, the burden of proving their compliance with the provision of the agreement granting CAVE an option to purchase from plaintiffs two DC-4 aircraft at $500,000 each; as well as the plaintiffs' breach thereof.

19. Defendants are entitled to judgment for $153,234.53 with interest from September 15, 1951.

Opinion.

(1392) PALMIERI, D. J.

This action, in which both sides seek substantial damages, arises out of a written agreement executed by the (1393) parties on July 25, 1951. The corporate defendant[1] held a franchise issued by the Venezuelan Government for trans-Atlantic air routes with Caracas, Venezuela, as the home terminal. The plaintiffs were non-schedule carriers and the owners and operators of aircraft two of which were to be used for the purpose of exploiting the Venezuelan franchise. Previous operation under the franchise had resulted in losses to the defendants, and at the time of the negotiations which led to the agreement, the franchise had been dormant for several months. In these negotiations with the plaintiffs the defendants urged that their failure had resulted only from a lack of the working capital necessary to make the operation profitable. They furnished the plaintiffs with a written appraisal of the enterprise, entitled "Prospects for the Development of Air Transportation Between Venezuela and Europe Under the Franchise of Aerovias Venezuela Europa." It stated in substance that given adequate investment and promotion, the passenger and mail potential for these routes could yield substantial net profits. But it also showed that (1394) the defendants had suffered recent and substantial losses; and that in the spring of 1951 they had sold their operating property and equipment. Plaintiffs relied upon their own investigation which appeared to confirm the suggestion that the routes were a good risk. The plaintiffs embarked upon the enterprise fully cog-

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[1] Compania Aerea Viajes Expresos de Venezuela, S.A. (CAVE). is a Venezuelan corporation and Jorge Marcano, the individual defendant, is its President and principal stockholder. Its international division is Aerovias Venezuela Europa (AVE). AVE has no juridical identity separate and apart from CAVE.

nizant of its serious business hazards. They agreed to employ two planes on the defendants' routes for a period of one year. Defendants promised to maintain landing and traffic rights on the routes between Europe and Venezuela. Substantially all responsibility for operations was assumed by the plaintiffs. In addition to $1500 per round trip flown, defendants were to receive 50% of all gross revenue in excess of $2.25 per revenue mile averaged over a period of three consecutive months, with a guarantee, beginning 60 days from the date of the contract, of $3000 per week. Operation was to begin not later than August 15, 1951. The agreement was to remain in force for one year, and to be renewable thereafter by agreement of the parties.

The contract, as well as the statement of "Prospects" furnished by the defendants, anticipated an initial schedule of two round trips per week. This anticipation immediately proved unfounded. Between August 19 and September 8, plaintiffs placed one plane in operation and flew three one-way trips, two to Europe, one from Europe, averaging substantially less (1395) than a third of their passenger carrying capacity. They carried a total of only about 50 passengers out of a potential total of about 180. Meanwhile, the Korean airlift, necessitated by military operations in Korea, offered the plaintiffs certain prospect of quick profits without comparable risk, and apparently affected the plaintiffs' decision to abandon this enterprise.

On or about September 8, 1951, plaintiffs took steps to withdraw their one aircraft from operation and send it to the United States. Shortly thereafter, on September 15, 1951, they announced their decision to withdraw from the enterprise completely. The principal reason given by the plaintiffs at that time, and repeated upon the trial by Mr. Ralph Cox, Jr., their main witness, was that they had

failed to secure full loads of passengers and, in the absence of full loads, the operation was unprofitable and the plaintiffs were in no position financially to carry it out. The plaintiffs had no lawful ground to withdraw on this account as the defendants had made no commitment at any time to guarantee the plaintiffs full loads of passengers. On the contrary, the evidence indicated that much developmental work (advertising, operational and administrative reorganization, development of good will, etc.) remained to be done before exploitation of the franchise could become profitable. The evidence also indicated that this developmental work could not be accomplished without the (1396) expenditure of considerable time and effort. Thus, responsibility for breach of the contract rested solely upon the plaintiffs. The plaintiffs professed to have other reasons, based largely on fraud and deceit, to justify their conduct. Except for the matter of the renewal of Portuguese landing rights, discussed below, these reasons lacked substantiation.

Upon the trial, I dismissed, for insufficiency of proof, all of the allegations in the complaint sounding in fraud, misrepresentation, deceit, breach of fiduciary relationship and conspiracy to defraud. There was no factual substantiation for the plaintiffs' claim that any fraud or deceit was perpetrated upon them by the defendants or that the defendants owed the plaintiffs any fiduciary duty; or that, assuming *arguendo* the existence of such duty, it was violated. Thus, the plaintiffs have no valid basis for rescission on the grounds of fraudulent inducement. The plaintiffs formulated their own opinions regarding the enterprise before entering into their contract and they cannot be said to have relied, to their detriment, upon the representations of the defendants. *Vokal* v. *United States*, 177 F. 2d 619, 624 (9th Cir. 1949); *D. C. Land & Bldg. Co., Inc* v. *McInerney*, 64 F. 2d 554 (D. C. Cir. 1933);

Patten v. *Glatz*, 87 Fed. 283 (2d Cir. 1898); *Security Investment Co.* v. *Garrett*, 3 App. D. C. 69 (1894); *Sanders* v. *Lyon*, 9 D. C. 452 (1875).

(1397) The dismissal of these allegations necessarily disposes of the plaintiffs' claim for exemplary damages—a claim which is predicated upon the allegations of fraud and misrepresentations.

Thus, the case resolved itself into a claim by the defendants for breach of contract. There is no question of the plaintiffs' willful refusal to continue performance under the contract. They claim, however, that their refusal was justified by the failure to realize expectations of the contracting parties of ample passenger traffic. There is no doubt that the parties were sanguine, indeed, over-optimistic about the prospects of this venture. They apparently believed that the dormant franchise could be turned into a going and prosperous concern within a period of two months. But the proof before me indicated that the hopes of the parties might not have been realized even within the contractual period of one year.

The mere fact that actualities fall short of expectations is not a proper ground for rescission or repudiation of a binding contract. There is no evidence that the over-optimism was a result of a mutual mistake or misunderstanding of the parties concerning the conditions under which they were to operate. Nor is this a case where the purpose of the contracting parties was frustrated by circumstances which could not have been anticipated or taken into account at the time of the contract. *Cf. Chandler* v. *Webster*, [1904] (1398) 1 K. B. 493 (C. A.); *Krell* v. *Henry*, [1903] 2 K. B. 740 (C. A.); *Herne Bay Steam Boat Co.* v. *Hutton*, [1903] 2 K. B. 683; *Alfred Marks Realty Co.* v. *Hotel Hermitage Co.*, 170 App. Div. 484, 156 N.Y.S. 179 (1915). Parties entering into a speculative venture hazard the risk of an overestimation of its business possibilities.

Moxham v. *Sherwood Co. of West Virginia*, 267 Fed. 781 (4th Cir. 1920). The only question, where, as here, a party seeks relief from an undertaking engaged in at a risk, is whether or not it agreed to assume the risk when contracting. *Day* v. *United States*, 245 U. S. 159 (1917); *Moxham* v. *Sherwood Co., supra.* Here the plaintiffs assumed the risks, and abandoned the venture at their peril.

The impact of the evidence upon the trial as well as my understanding of the written agreement have led me to the conclusion that the plaintiffs made clear and unequivocal commitments in return for the right to exploit a franchise which offered questionable hopes of successful exploitation. The provision for the $3000 per week guarantee after September 23, 1954 in clause 1 F of the contract spells out an intent on the part of the plaintiffs to assume the risk of loss or failure. Such a guarantee is enforceable even though the purpose of the guarantor in contracting be wholly frustrated as, for instance, by the non-existence of the subject matter of the contract. Conspicuous examples are the cases (1399) of mining leases yielding little or no ore. *Lehigh Zinc & Iron Co.* v. *Bamford*, 150 U. S. 665 (1893); *Rocky Mountain Fuel Co.* v. *Albion Realty & Securities Co.*, 70 F. 2d 212 (10th Cir. 1934); *Moxham* v. *Sherwood Co. of W. Virginia*, 267 Fed. 781 (4th Cir. 1920).

It follows, therefore, that the defendants are entitled to be awarded the guarantee for the contractual period, plus the out of pocket expenses incurred by them and for which plaintiffs were obligated to reimburse them under Clause 1 G of the agreement.

There should be a deduction, however, for the defendants' breach of obligation to procure the Portuguese landing rights in time. The plaintiffs have claimed that the defendants breached the contract by their failure to comply with the contract provision for landing rights at Lisbon by the contract date. Admittedly, these rights were not

procured until September 8th, a few weeks after the contract was signed. There is no evidence, however, that the plaintiffs had sought to take advantage of Portuguese traffic prior to that date. The breach was not material, and the plaintiffs' damages were small.

The plaintiffs have also sought to assail the legality of the Venezuelan franchise held by the defendant CAVE under Venezuelan law. In my opinion, the plaintiffs have not succeeded in proving this and I accept the conclusions of the expert on Venezuelan law who testified for the defendants and who supported the validity of the defendants' franchise.

(1400) The defendants claim substantial damages because of plaintiffs' alleged responsibility for the loss of the franchise. But the evidence was insufficient to establish a causal relationship between the acts of the plaintiffs and the eventual revocation of the franchise by the Venezuelan Government.

Moreover, the value of the franchise itself is clearly too speculative and, assuming the value were pertinent to the question of damages, I could not attribute any value to it for the purpose of this litigation. As I have already indicated, the situation prior to the contract was that the defendants had sold their operating equipment, they had incurred substantial losses, and the franchise was nothing more than a mere shell. The possibility of its successful exploitation was doubtful at the time the parties entered into their contract. It required a considerable financial and administrative effort to rehabilitate the operations required by this franchise. The plaintiffs soon found that they were unable to accomplish this and the defendants themselves were unable to undertake operations or to find anyone who would. I cannot attribute to the plaintiffs any responsibility for this situation. The situation was, indeed, precarious when the plaintiffs embarked upon the enter-

prise. It was no less precarious when they departed from it a few weeks after they entered into their contract. (1401) In my opinion, there is no diminution in value of the franchise which can be charged to the plaintiffs and which can be translated into damages.

One other matter needs discussion. The contract contained the following provision giving the defendants an option to buy the plaintiffs' two aircraft:

> "Overseas shall . . .
>
> "Grant to CAVE an option to purchase those DC-4 aircraft used in the operation for a total price of $500,000 each, such option to be exercisable only if Overseas decides to discontinue its participation in such operation as defined in this agreement."

The defendants claim substantial damages for the plaintiffs' alleged failure to comply with this option provision. The defendants sought to exercise this option for the purpose of conducting a paper speculation with these aircraft which would have netted them a considerable profit. Such an exercise of this option would have been a distortion of the meaning of the contract and inconsistent with the intention of the parties. The proof on both sides was unequivocal that the exercise of this option was intended to permit the defendants to operate their routes so they would not be left without aircraft in the event plaintiffs failed to fly them. The uncontroverted proof was that the defendants invoked the option not to continue operations but to effect a profitable paper speculation. In (1402) point of fact, they lacked the money with which to buy the aircraft from the plaintiffs pursuant to this option. Yet, because of the favorable market conditions created by the Korean War, they were, in effect, seeking to buy the plaintiffs' aircraft for immediate resale at a substantial profit by

means of a paper transaction. This was not what the option provision of the contract was intended to accomplish. Accordingly, I dismissed the defendants' counterclaim based upon the plaintiffs' alleged failure to comply with the option provisions of the agreement of July 25, 1951.

The defendants are entitled to judgment as follows: $2,250.00 for plaintiffs' failure to pay $1,500.00 per round trip flown plus $132,000.00, the minimum guarantee of $3,000.00 per week commencing September 23, 1951, or a total of $134,250.00; less $2,250.00 for the defendants' failure to renew the Lisbon rights on time. The defendants are also entitled to recover $21,234.53 for out of pocket expenses incurred in necessary compliance with the contract. Thus, the defendants are entitled to recover judgment for $153,234.53, with interest from September 15, 1951.

Findings of Fact and Conclusions of Law are filed herewith.

Submit judgment on notice in accordance herewith.

Dated: August 30, 1956.

EDWARD L. PALMIERI
Edward L. Palmieri
U.S.D.J.

(1469) JUDGMENT

The issues in the above-entitled action having been brought on regularly for trial before the Hon. Edmund L. Palmieri on June 18, 19, 20, 21, 22, 25, 26 and 27, 1956, and a decision having been rendered against the plaintiffs and in favor of defendants, it is

ADJUDGED that the plaintiffs recover nothing from the defendants; that the defendants have judgment against the plaintiffs for the sum of $153,234.53, with interest from September 15, 1951; and that defendants recover from plaintiffs costs and disbursements in the action to be taxed.

Dated: New York, N. Y., September 6, 1956.

s/ Edmund L. Palmieri
U.S.D.J.

H.A.C.

EDMUND L. PALMIERI

Judgment entered

HERBERT A. CHARLSON
9/17/56
Clerk

Testimony.

• • •

(13) RALPH COX, JR., called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Schoenwald:

Q. Mr. Cox, will you tell us what your connection with U. S. Overseas Airlines is. A. I am an officer and a stockholder in the company.

Q. What was your connection during 1951? A. The same connection.

Q. When did you receive notice about the existence of the defendant and its interest in obtaining a contract with a corporation that had airplanes?

• • •

A. I first heard of the existence of this company (14) from one of our pilots in, I believe it was, May of 1951.

Q. What did you learn at that time?

The Court: That would be hearsay. He cannot testify as to what he learned.

Q. What was the first connection that you had or first meeting that you had with the defendants? A. Sometime around the middle of July of 1951.

Q. What was the nature of that communication or meeting? Was it a letter or was it a phone call or a conference? A. There was a—

• • •

(15) The Court: I will have to take whatever of it I think is competent at this point. Of course you understand, Mr. Schoenwald, that if I find that the parties reduced their understanding to writing, their obligations and their responsibilities to each

other are limited as defined by their writing. We have got to be very careful not to go into a vast exploratory field that will divert us from that purpose.

Mr. Schoenwald: If your Honor please, I think that the terms of the contract essentially appear in the contract. However, I think it is essential in an action for fraud that the representations which were made, inducing this party to enter into the contract, are the very basis of this action.

The Court: You have a very heavy burden. Your constant repetition of the word "fraud" doesn't increase your rights any. You have to come forward with proper proof, and you have a very heavy burden, and I needn't tell you what that burden is. I am sure you are aware of it. I am going to hold you to what I consider to be applicable rules of evidence in this action.

• • •

(16) Q. What was the first contact that you had with this defendant? A. I met Mr. Marshall at his home in Washington.

Q. About when was that? A. Around the middle of July or a little after the middle, of 1951.

Q. What took place at that meeting? First you might tell us who was present. Who was present at that meeting? A. Along with me was our chief pilot, Mr. Burger, and another officer of the company, Mr. McCormack. We arrived at Mr. Marshall's house and we were given copies of this prospectus:

Mr. Schoenwald: I believe that we have a number. I would now like to have that marked in evidence.

Q. What happened at that meeting?

• • •

(17) The Court: What is the exhibit number?

Mr. Schoenwald: We would like this numbered 357.

Mr. Nickerson: What is the number?

Mr. Schoenwald: 357.

(Received in evidence as Plaintiff's Exhibit 357.)

Q. Will you briefly relate to us what happened at that conference, telling what was told to you and what you said. A. When we arrived, Mr. McCormack, who had previously spoken to Mr. Marshall on the telephone, said that our copies of this proposal had not arrived by mail and we hadn't had a chance to see it.

He said, "Well, why don't you sit down and read it now?"; which we all proceeded to do.

Mr. McCormack said, "What's the deal?" or words to that effect.

Marshall said, "Well, it is outlined here. If there are any further questions I might be able to answer them. I will try."

(18) So after some preliminary discussion about mutual people in the business that we both knew, Marshall stated that for all intents and purposes—we asked him who CAVE was and some background, and he said that at the present, for all intents and purposes, it constituted Colonel Marcano, since he had bought out the previous stockholders, and that he had been connected with the Embassy and the Government of Venezuela, and that he had been quite active in aviation matters in Venezuela.

So he said that they had previously operated in 1950 with a couple of planes they had leased, which they ulti-

mately bought, but they had sold these airplanes and ceased operations sometime in the spring of 1951 because the spare parts situation and the maintenance had not been what they wanted, and they had had delays, and they didn't really have what they considered a competent enough operation, and they were anxious to get someone that they thought had so-called American know-how to operate more professionally.

He asked us if we had equipment. We said we had, we had pilots; we had flown the Atlantic.

We asked him what was the nature of the traffic. He said that it was basically immigrant (19) traffic moving from Rome to—or, rather, Italy, to Venezuela, and that this traffic had an immense backlog; that there was considerable advantage to dealing, that is for AVE to be dealing in this traffic because of their close association through Colonel Marcano to the Embassy, Venezuelan Embassy in Rome.

He said that although people couldn't come right out and say that it would be handled thus and so, that is, that favoritism would be shown AVE because of the connections and the hero status of Colonel Marcano in Venezuela, that he felt sure that there would be no trouble whatsoever in arranging all the technical visas and exit permits and so on; that their loads had been very heavy, and that they hadn't too much eastbound traffic but that that had started to build up, because a lot of these people were then returning to Rome, and they had relatives coming over and visiting them, but that the heavy loads westbound of immigrant traffic, at the rates they calculated, would be more than enough to support an operation at a profit. Further, that the mail rights both ways were current.

He went on to say that something of particular interest, he thought, to us would be their traffic (20) out of Bermuda eastbound to Europe. As a matter of fact, he said

they had an agent here in New York to develop that traffic and it would be routed to Bermuda on some other method of transportation and then we would take, AVE would take it from there.

He said that they had a natural affinity between Spain and Venezuela; traffic should be very heavy there. They had had a little difficulty with money being tied up in Spain, and the exchange, but they felt that would be solved in the very near future, but that the currency in Venezuela was actually stronger than the dollar and there would be no trouble in that respect.

I believe he calculated the gross revenue at $2.25, roughly, per mile.

Q. Could you translate that into gross per year because I don't think either the Judge or myself knows the significance. A. If I could look at that prospectus, I could probably review it.

Q. Yes (handing paper). A. Yes. They felt with a load factor eastbound of 82 percent or, rather, 40 percent eastbound, and 82 percent westbound, that would be the immigrant (21) traffic, on the basis of two schedules per week with a 50-passenger plane would produce about 36 million revenue passenger miles per year, and that their income would run $2.6 million per year in gross, or a rate of $2.25 per revenue aircraft mile.

Mr. Nickerson: What page is that?
The Witness: Page 3.

A. (continuing) And it was their opinion, and we tended to agree with them from our previous experience, that operating costs per revenue mile, utilizing DC-4s, should be well under the gross revenue estimate, namely, that $2.25 a mile, which indicated a possibility of an attractive profit.

Q. Was there any discussion of their past earnings or lack of earnings in passenger experience, gross and net? A. Yes. They stated that they made a profit.

Q. A profit during what period? A. During 1950.

The Court: When you say "they stated," who is "they"?

The Witness: "They" being AVE.

The Court: When I last heard you make a specific reference, you were at the home of Mr. Marshall (22) in Washington, talking to Mr. Marshall.

The Witness: That is correct. Mr. Marshall was representing AVE, and when I say—I mean AVE, the airline, the Venezuelan airline.

The Court: They had to speak through someone. Were they still speaking through Marshall?

The Witness: Yes, they were still speaking through Mr. Marshall.

The Court: So Mr. Marshall said what you have just testified to?

The Witness: That's correct, sir, and also their prospectus that I have here—

The Court: What page?

The Witness: (continuing)—revealed that, too.

The Court: What paragraph?

The Witness: On page 3 of the prospectus.

The Court: What paragraph?

The Witness: Paragraphs 6, 7 and 8, sir.

* * *

(23) Q. If you find that the examination of this exhibit will assist you in refreshing your recollection as to what was told to you during this conference in Mr. Marshall's home in Washington, please make use of it. Do you want to continue or shall I ask you? Do you have any more

recollection or would you like to examine this? A. That is the same as I have (indicating)?

Q. Yes, it is a photostatic copy. A. Well, he reiterated that, after we discussed it back and forth, that this was a very profitable operation, but the Colonel had partners that he wanted to buy out; that they had not been, in his opinion, the business attitude that should be had, and that they had a lot of free rides given to friends, and that they didn't keep their business dealings the way they should have, and that he didn't feel they were competitive with the other airlines in that respect; that is the only reason they had stopped operating, but even in spite of that they had shown what he considered a handsome profit for the year.

(24) Q. Was there any discussion of the rights of the defendant—perhaps before you answer that question you might briefly help us define for the Judge, as best you know, what traffic rights are.

Mr. Schoenwald: Judge, are you familiar with this subject matter of traffic rights?

The Court: I have some familiarity with it. Go ahead.

Q. Tell us what traffic rights and franchise rights are. A. They had, Mr. Marshall said, landing and franchise rights, that is, the pickup and discharge of passengers, in Bermuda, Lisbon, Madrid, Rome and Paris and Caracas; further, that they were the only flag scheduled carrier operating across the Atlantic under the Venezuelan flag; they would be equivalent in their country to, say, Air France in France or British Overseas in Great Britain, and that that would be considerable prestige in these various countries.

Q. Were you told anything about the fares and the tariffs that you might be enable to expect? A. Yes, they had

previously charged a tariff, I think it was, of $358 for the immigrants per immigrant from Italy to Caracas.

(25) Q. At page 13, I think. A. $350, and the regular fare was $385, whereas the Madrid fare and the Lisbon fare was $452 per passenger, and the Paris fare, $454.

Q. Was there any discussion of your acquiring stock in the defendant corporation? A. Yes, there was.

Q. Was that at this meeting? A. At this meeting.

Q. Tell us what was said and who said it and what you said. A. I believe the way the stock discussion came out was when Mr. Marshall said Marcano had bought out these partners so that he practically owned one hundred percent of the stock at that time; that they were considering making available stock to the company, such as ours, if we went ahead with this proposition. I believe it was up to 35 or 50 percent of the stock they were going to make available, the idea being, and we didn't look unfavorably toward this, that there would be a close relationship between the two groups, and a permanent relationship to be built up that way, with mutual confidence on both sides.

Q. Was there any discussion of when the business (26) ought to begin, when you were to begin to provide airplanes? A. Well, from the very beginning it seemed there was a crisis to get started within a matter of days. I believe it was the 15th of August of '51, which would be less than a month from the time we first met—that I first met Marshall, that they had to have an airplane in Venezuela and operating or they would lose their franchise rights for not having used it.

Q. Did you make any observations on this topic that opening day? A. I said it would be very difficult to make all the arrangements so quickly and I doubted that it could be done that quickly but we would try, if we decided to proceed with the proposition.

Q. Was there any discussion at this time as to the kind of aircraft you were to provide? A. Yes.

Q. And the number of aircraft? A. There was discussion that we would need between two and three flights a week to handle the traffic; the backlog of immigrants was such that between two and three flights would be needed, which (27) they thought would require two airplanes, and they had to be long-range DC-4s, which we happened to have. Our equipment in other words, was satisfactory.

Q. When you just adverted to a backlog, who mentioned the fact or the existence of the backlog? A. Mr. Marshall said there was a very heavy backlog of traffic, immigrant traffic, in Rome, waiting to—awaiting the initiation of the AVE routes again.

Mr. Schoenwald: I would like to call your Honor's attention to the fact that that also appears in the prospectus on page 16 that you have before you.

Q. Was there any discussion—

* * *

Q. Was there any discussion of other things that you were to provide or that would be expected of you? A. We were to provide the airplanes and the crew and the maintenance and the spare parts. That was initially what they had in mind.

Q. Was there any discussion of the nature of (28) the Colonel's relationship to the future enterprise? A. Yes, there was.

Q. What was the substance of that and who said what and what did you say? A. We asked Mr. Marshall about that and he said that Colonel Marcano would function in all diplomatic matters, traffic matters, arrangements between the various countries. He required for this payment per trip of $1,500 plus, I think they wanted $20,000 a year

counsel fees. It was also discussed that Marcano, I believe, would have a salary of $25,000 a year but ultimately that was dropped. We felt that $1,500 per trip was too high.

Mr. Nickerson: Your Honor, I object to what they felt.

The Court: Yes, sustained.

Mr. Nickerson: Or what Mr. Marshall felt. What he said, what Marshall said.

A. I should say that I said I thought $1,500 was too high.

Q. Can you think of any other topics that relate to the exhibit, copy of which you have in your hand, that were discussed at this meeting? Do you want to go through it? (29) A. Well, there was a question of the airplanes. I said that I wanted to keep the airplanes, if we went into this thing, under American registry because in effect we were leasing the planes with a crew to this company.

Q. Was there any attorney present with you at this conference? A. No.

Q. How did this conference end? A. Well, the way it ended was this: Marshall said, "If you are interested in this thing, I suggest that you write a letter to Marcano along the following points."

I made notes of the various things that he wanted incorporated in the letter.

Fritz Burger and McCormack and I left. We went back to—I think Mr. McCormack stayed in Washington. Burger and I went to Wildwood, and I think after a day or so we drafted a letter—

Q. Is this— A. (continuing) —as outlined by the points that Mr.—

Q. Is this a copy of that letter? A. (continuing) —Marshall suggested. (30) This is the letter, yes, sir.

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The Court: Defendant's Exhibit G is offered in evidence in lieu of Plaintiff's Exhibit 337 for identification, since it is the original.

(Received in evidence as Defendant's Exhibit G.)

Q. Are there any parts of that letter which weren't the suggestions of Mr. Marshall but things you conceived, you were instructed to put into the letter? A. There were a couple of points, one, that we had proposed United States registered aircraft under lease to AVE, featuring their flag, the Venezuelan flag (31) and the AVE marking. We didn't want to put the planes under foreign registry. That was one.

We also proposed that we conduct the actual ticketing, flight operations, maintenance, traffic, and that accounting would be accomplished by a certified public accountant.

Q. I would like to go back for a moment to Plaintiff's Exhibit 357, which is this document, which I call the prospectus. I would like to ask you had you heard about the existence of this prospectus before you had actually seen it? A. I had heard about it from McCormack.

Q. What did— A. That it was being sent to us.

Mr. Nickerson: I object to what he heard about it.

The Court: Yes, sustained.

Mr. Schoenwald: I didn't ask the question.

Q. At the meeting at which Mr. Marshall was present, was there any discussing as to what this prospectus was for? A. Yes.

Q. What were you told? A. Mr. Marshall said this prospectus had been gotten up by an independent firm, Gotch & Crawford, (32) for the purpose of soliciting the industry to find an operator that would be satisfactory to come to Venezuela.

Q. Was there any other—

Mr. Nickerson: Your Honor, I don't see how that is relevant. I move to strike it.

The Court: I will reserve decision. I think all this should either stand or fall on the same basis.

Q. Was there any indication of what use you were to make of that paper at the start? A. He said, Marshall said, that the evidence or the material in this document had been acquired by this independent firm and that it was, in his opinion, a very, very conservative estimate of the potentialities, and also it represented the past history of AVE in relation, he said, to the future planning, outlining all the past history, the relationships with the various governments.

Q. Did you have any discussions at this meeting about the drafting of a contract in so far as the contents of this paper are concerned, this Exhibit 357? A. Yes, we had a discussion.

I said, "Well, what do you suggest is the next step? Should we be interested in this?"

(33) He said, "Time is of the essence. You have got to get down there, or Marcano should be up here in a day or two, and I would like to get this letter off to him." He said, "First, you have got to write this letter," and he outlined the points that we should incorporate in the letter.

Q. Was that before you had read this paper? A. No, that was after we had read it. We sat down after we first got to his place and read this. It took an hour or so. It was the first time we had seen this.

Q. After that was there any discussion about this Exhibit 357? A. Yes, there were various questions asked by and discussed by us back and forth.

Q. What did you say and what did Mr. Marshall say, if

anything? A. I said to Marshall, "As you know, we are a non-sched airline, so-called. We are not permitted to run scheduled flights. We never have been, and we have to live from day to day. We don't have any subsidy. We never have had."

He said, "I am familiar, I used to be with CAB."

(34) So I said that I thought we had good equipment, it was paid for, and we had good pilots. We didn't have a lot of money that we could finance or subsidise an operation for any length of time at all, that this thing, if we go into it, would have to sustain itself from the beginning. We felt, and we agreed, that the $2 a mile, $1.90 to $2 a mile or thereabouts would be a figure you would have to have to break even.

He said, "You will have no trouble. Our experience has been that you will have no trouble in grossing around $2.20"—it came to $2.22 a mile—and he said further that AVE—"you wouldn't have any expense to go to, in fact, since AVE have their officers set up throughout all these stations and had personnel there, they had offices, traffic procurement, especially in Rome, they had an excellent one right next to TWA."

Q. You keep referring to various stations and other matters. Where did you get the information as to what stations were involved and their past experience? Where was that obtained? A. Mr. Marshall told us that AVE had stations in those various cities, Rome, Paris, Madrid, Lisbon, Bermuda. They still had personnel there, and I think (35) he said that with cable notice they could all be activated practically overnight; so all we had to do was to get in there with the airplanes and fly the trips.

Q. At the end of this meeting what arrangements were made, if any, for another meeting? A. I believe it was arranged that as soon as our letter was in the mail, Mr. McCormack would get in touch with Marshall. McCormack

was in Washington, and he and Mr. Marshall spoke by phone from time to time, and I spoke to Marshall three or four times myself. In practically each case Mr. Marshall reiterated the urgency to get down there fast or the certificate would expire.

Q. When did you next get together and meet, or was there another piece of correspondence received by you or transmitted by you before you left? A. I cannot recall if there was or not. Do you have any in the file there?

Mr. Nickerson: Defendant's Exhibit I (handing).

Mr. Schoenwald: May this be marked in evidence, or is it deemed marked?

(Received in evidence as Defendant's Exhibit I.)

(36) Q. When you finish looking at that, Mr. Cox, I am going to ask you te tell us the circumstances under which that came to be made and was sent and what did you do with the letter.

Mr. Cox, can you tell us whether or not this letter was sent? A. Yes, this letter, to my best recollection, was sent.

Q. Can you tell us the circumstances under which it came to be made? A. Yes, I can.

Q. Tell us about that, please.

Mr. Nickerson: Your Honor, I object to that. It speaks for itself.

The Court: I overrule you for the time being.

A. The reason—

The Court: I just don't know enough about the facts.

A. Upon Mr. Marshall's receipt of this letter of the 19th, he phoned me in Wildwood and he said, "I have been in contact with Marcano and there are certain things we have

got to clarify and suggested that I make notes of these points and incorporate them in another letter, which I proceeded to do."

(37) Our wish to keep the airplane under American registry was out or couldn't be done. We had to put it under Venezuelan registry if we wanted to go ahead with this deal.

I note that was under paragraph 2.

We agreed to that in the letter of July 21st.

We requested that we have some representative on the board of directors of AVE. They agreed to that. That was a change, or that was to be incorporated in the second letter.

They agreed that we could handle all the flying operations, maintenance, including ticketing and reservations.

Mr. Nickerson: I don't want to interrupt, but is this in the telephone call with Marshall that he was talking about?

The Witness: Every one of these points was in the telephone call. Marshall reiterated and suggested we get this final letter, which would be acceptable to Marcano.

The Court: But the composition of the letter and the position taken in the letter, I suppose, were your own decisions, not Marshall's.

The Witness: The letter went out over our (38) signature, and we were told if we didn't incorporate these points there wasn't any point in writing the letter because it couldn't go on from there unless we covered the points, these thirteen points, in this letter of the 21st of July.

Q. Had you received any reply to that earlier letter of July 19th? A. No. The telephone call was the reply to that, to the best of my recollection.

Q. Did you receive any reply to the letter of the 21st? A. I don't believe so.

Q. What was the next event which took place following the sending of the letter of the 21st? A. I believe the next contact was our flying down to Venezuela to see Marcano. Up to that point we had never seen him or met him, and he couldn't get up to New York or to Washington to talk to us, so—

Q. Was the contract signed before you went down to Venezuela? A. Yes, it was.

Q. Was that, do you think, the next meeting you had? A. That would be right. We had a meeting over (39) in our office in Washington at the airport. I cannot recall that date. If you have the contract, I will remember it. It was the latter part of July.

Q. Would that be the date that appears in the contract? A. Yes, sir, it would be. We signed that contract one evening, late in the evening.

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Mr. Nickerson: Defendant's Exhibit N.

(Received in evidence as Defendant's Exhibit N.)

Q. Does that refresh your recollection as to when the contract was signed (indicating)? A. That's right, the 25th of July 1951, about four days after this letter was written.

Q. Who was present at the time of the signing of the contract? A. Marshall, McCormack, our office girl, Marilyn Wilcox, who typed that up that night in our office, myself, and I think Burger.

Q. Who gave the instructions as to what to type up? I understand the secretary typed it up, but who (40) told her what to put in it? A. Mr. Marshall dictated the contract and our secretary typed it.

Q. Did you have any attorney present at that time? A. No, we didn't.

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(41) The Court: Have you finished the testimony with respect to the signing in Washington on July 25th?

The Witness: I believe so.

I said, "Well, what happens now?"

He said, "We will send this down to Marcano and if he approves it it will be signed," but he didn't think there would be any difficulty there.

Q. Did you have any part in preparing the terms of this agreement that was dictated to your secretary? Did you draft any of the terms? A. No, I didn't draft any of the terms.

Q. Or recommend any of them? A. Only in so far as those two letters covered the points in there.

Q. After this agreement was signed, what was the next connection you had with the defendant? (42) A. I believe the next, well, the next day McCormack and Marshall were in touch, and I spoke to Marshall—I don't recall just which day—but he was concerned with how quickly we could get the airplanes down there because he felt now we would have to export the planes, which was correct, and that would take time. They had to be licensed or inspected for export by the CAA. We had to make a lot of different arrangements, spare parts, and we had to paint the airplane, and we renovated the seats and the interior, and it was a considerable job. He thought we would be late.

Q. When you say he felt—he thought— A. I would like to clarify that.

Q. Is that something you were told or something you thought that he felt? A. Because I am using slang ter-

minology. He told me this on the phone. And as soon as he heard that Marcano had signed this, he called and said, "The thing has been signed, the contract has been signed. You had better arrange a meeting as quickly as possible." Since Marcano couldn't come up, we had to go down to Venezuela.

So we took a DC-3 and seven or eight people, (43) and flew down to Venezuela from Wildwood, New Jersey. I forget the exact date. It was around the 1st of August, I believe, or the latter part of July.

Q. Who went on that trip? A. A man by the name of Earl Clemett, Fritz Burger, McCormack, a Mr. Van Boheman, who had been hired by us a couple of days before to act in the capacity of the traffic manager, and Mr. Waters, who was a communications expert, who had previously worked for AVE, my wife and I.

Q. Who did you see when you got there? A. We were met at the airport by a representative. I have forgotten his name. We were taken twenty miles to the city, checked into a hotel, and that evening we went—we met Marcano for the first time.

Q. Did you meet anybody else from the office at that time? A. The next day we met his accountant, a Mr. Morgan. We met a couple of maintenance people. I can't recall their names.

Q. What was the subject of discussion at that time? A. The subject basically was—well, the first day we didn't discuss any business. It was more of a social (44) visit. We went to dinner and talked about various—small talk. The next day we went down to his office and we were shown the traffic, the counters and the layout of his office in Caracas. Burger was intent on discussing the maintenance possibilities at Caracas, which turned out to be nil. They didn't have any equipment there to do maintenance.

Q. Did you raise that question with the Colonel? A. Yes, we did, but he thought it would be better to do the maintenance in Europe or in Bermuda. We agreed it would be, although we had hoped to do some of it in Caracas.

Q. What had led you to think you could do some of it in Caracas? A. I was under the impression from what I was told by Mr. Marshall up until that time that the airport at Caracas was very highly equipped and that they had hangars, shops there. It turned out the hangars were for light airplanes and they didn't have any facilities that could be used to handle DC-4s unless we were to purchase it from one of the competing airlines, and that was very expensive—a very expensive proposition.

Q. Was there any discussion as to when operations would begin or what you might expect? (45) A. Yes. I believe they set the date, the first flight they wanted to go out, at the 15th of August.

Q. When you say "they"— A. When I say "they" I mean AVE. Mr. Marcano told us that his traffic people had a load ready to go by August 15th and could we be there in time. I said we thought we could, we were bending every effort and turning everybody we had to this job.

Q. Where was this load from? A. It was from Caracas to Rome. I think some of them were destined for Madrid as well as Rome.

Q. Was there any discussion of the personnel or facilities which existed in the various other points along the route? A. Yes. Mr. Marcano reiterated that he had all the rights ready to go and that he would personally activate them and I shouldn't worry about that; just to make sure the planes fly; and having the pilots qualified to make them. He was concerned about maintenance because previously, apparently, that had been a stumbling block.

Q. Will you tell us, to the extent that you remember,

what you were told about the facil ies that (46) existed in Italy. A. Yes. In Italy he said they had an office in Italy right next to the TWA offices and that it would be a cinch to get overflow passengers from TWA. Being both scheduled airlines and flag carriers, TWA would cooperate wholeheartedly in diverting passengers or shifting passengers to AVE, and this would be in addition to the practically one hundred percent loads of immigrants.

Q. Had this office next to TWA been mentioned before? A. Yes, we had heard about this from Mr. Marshall.

Q. I would like to go back to the conference with Mr. Marshall in so far as it relates to this office.

Was there any discussion, that is, before the signing of the contract, was there any discussion as to who owned this office? A. Yes, there was a discussion that the office was either jointly or partly or a hundred percent, I forget, owned by Mr. Wooten from the previous operation, who was in this office, and I said, "Well, I cannot"—I said, "We don't want any other people in this thing."

He said, "Well, don't worry about that. (47) Marcano is buying Wooten out. Wooten will have nothing to do with it. The office will be a hundred percent Marcano's. Don't worry about that."

Q. Did he indicate he was going to acquire it or he had acquired the office? A. My impression was that he had acquired it or was in the process of acquiring it, but whether he had actually acquired it when I spoke to him, I cannot recall.

Q. Well, back in the conference with Mr. Marshall before the signing of the contract, was there any discussion about the facilities or resources available in Spain for this projected operation? A. Yes, they had a traffic office in Spain, they had representatives, station personnel there, they had full rights, traffic rights, franchise rights, mail rights, passenger discharge and pickup rights.

Q. What were you told about the resources and facilities existing in Portugal? A. Lisbon was also in the same category as Madrid.

Q. In what respect? Do you mean they had an agent? A. They had an agent there, they had traffic, full traffic, landing rights. Diplomatic arrangements (48) had already been made.

Q. How did this differ from the situation that was described to you in Rome? A. In Rome was the source of this heavy potential, this heavy immigrant traffic.

Q. Did they have agents there? A. They had agents in Rome. They had the Venezuelan embassy there that worked very closely with the agents in processing these visas and permits that were necessary for immigration to Venezuela.

* * *

By Mr. Schoenwald:

Q. You mentioned a Mr. Burger. What was his connection with this enterprise? A. Burger was our chief pilot and operations director.

Q. What was his relationship to the operation of CAVE or AVE? Had he been assigned any mission? A. When we went ahead on this proposition and signed the contract, Burger was detailed to go down to take charge of the operation, the entire operation.

Q. What was Mr. Van Boheman's function in connection with this CAVE and AVE operation? (49) A. Van Bohemah was supposed to take charge of the traffic. That was his job.

Q. Were there any other personnel assigned to this operation? A. Waters, Dave Waters, was assigned to be in charge of communications. Then we had some more pilots and crew members assigned. Campas was one of their names. I have forgotten the rest.

Q. Did you make any independent investigation of the accuracy of the material contained in the prospectus? A. No, we did not. I think that was mentioned and Marshall said, "Well, this material here has been compounded by an independent firm, which is practically the same as an independent audit like." He said, "If they signed it, that is true. You can accept this as being the true facts and you don't need to waste time. Besides that, we have got to get started. This thing is so late now, if we don't get down there at once, we will lose the franchise." So I didn't check the accuracy of the prospectus at all.

Q. Did you read it? A. Oh, yes, we read it. We discussed it back and forth and we accepted it.

(50) Q. When you say you discussed it back and forth, with whom did you discuss it? A. With Mr. McCormack and Burger and I think with Clemett.

Q. Who is Mr. McCormack? A. McCormack at that time was our vice-president and he was the Washington representative for our company.

Q. Mr. Clemett? A. Mr. Clemett was a pilot and an officer and he was in charge of our maintenance.

Q. Was there any discussion of whether or not you were to provide agents or representatives for the sale of tickets in Europe? I am still referring to your conferences before the signing of the contract. A. We felt, and we stated, that we didn't want any ticket agents as such, third-party agents, in between us and the operation, and we wanted to have control, that is, the supervision of the sales and the processing of the tickets.

Q. Does that mean you personally were actually going to sell the tickets to passengers? A. No, that didn't. It meant that we would have the overall supervision of it. Marcano's people, so Marshall told me, were still in Rome, the (51) previous agents and traffic people, who could

be alerted overnight, and they were familiar with all the procedures, and that would be the best way to—as a matter of fact, he said the backlog was so great that a scheduled operation would be necessary right from the beginning and we would have to have extra crews stationed in Rome.

Q. Did you ultimately obtain extra crews? A. Yes. Actually we sent extra crews over to Rome before the first flight, anticipating an immediate turnaround of the plane.

Q. Was there any discussion what the defendant would have to do to put the business back in motion? A. The only thing they had to do, so both Mr. Marshall and Marcano told me, was to alert their station people with a telegram; that they had simply suspended operations and everybody was awaiting the notice of resumption of operations.

Q. Did you ask them why they had suspended their operations in the past? A. Yes, I did. Well, he said it was primarily—

Q. Who is "he"? A. Mr. Marshall said that Marcano suspended primarily because Marcano had felt that under the (52) operation at that time they weren't properly developing the routes, the potential; they had too many partners that didn't know anything about the business, which was impeding progress. They had had maintenance difficulties with the other people at that time, maintaining the equipment, so he sold the airplanes; cleaned it out, bought his other partners out, and wanted to start up again, since the rights were still valid right up until this deadline of August 15th.

Q. Were any inquiries made about the particular passenger experience the defendants had had during their period of operation? A. Yes. He said that they had had very satisfactory passenger traffic from Rome; that they

hadn't concentrated much on the eastbound but they had, I think, $2.70 mail rate per ton mile.

Q. Did you ask for any particulars about that? A. I did, but Mr. Marshall said "Everything pertaining to the operation of any consequence is in this prospectus," and that we should, in effect, consider this the final word and the bible on the thing; that he personally would check with Marcano any specific point, but this was it. Take it and read it (53) and tell him what we want to do about it. It was being circulated to the rest of the industry.

Actually, Mr. McCormack wanted to get some sort of memorandum or get down to some discussion while I was still in Europe, but—

Q. When was this? A. I was in Europe until the 10th or 12th of July, and Marcano said, "You have to wait until the prospectus is distributed."

Mr. Nickerson: Is this conversation between Marcano and McCormack? I don't believe it is proper for this witness at the time—

The Court: Unless he were present, and I will sustain the objection.

Mr. Nickerson: He was in Europe.

The Court: Was this a discussion that took place in your absence?

The Witness: Initially the discussion took place in my absence, sir, but when we got to Mr. Marshall's home, Marshall and Mr. McCormack, to bring the thing up to date, talked over what they had previously discussed so Burger and I would then be familiar, you know, with the whole background. There wasn't much background because we hadn't seen this yet.

(54) Q. Who hadn't seen that yet? A. I hadn't, nor had Burger.

The Court: That is—

The Witness: The prospectus.

The Court: But this conversation you just gave, was that a conversation between you and Marshall or between Marshall and McCormick in your presence or something you were told about?

The Witness: No. First I heard about it from McCormick. Then when we got down to Marshall's office or in his home, we brought out the fact, McCormick said, "Well, you know, time is of such essence, we could have gotten a little start on this previously had we"—

Then Marshall said, "Well, up to this point we didn't have this printed and until that time we didn't want to discuss this with anybody until the prospectus was printed and then we would distribute it generally to the industry."

Q. Was there any discussion by Mr. Marshall of how many crews you would need to have available on this enterprise? A. Mr. Marshall said, "You fellows, you know, are non-sched operators" and the only question was we (55) would have to become scheduled and conscious of schedules and operations, and he wanted to make sure we would have an extra crew in Rome, based in Rome, so there would be no delay on turnarounds.

He said, "You are going to find that those immigrant loads are waiting and you can't disappoint the passengers. We previously had delays and we had departures more or less fouled up as far as the traffic was concerned and we disappointed people," and he wanted to make definitely sure that we had the personnel who could operate it.

We assured him we thought we could do it.

Q. How many crews did you actually assign to this operation? A. We assigned—

Mr. Nickerson: I think he testified to this.

A. (continuing) —I believe we sent two crews over to Rome and then Burger said he would fly some of the flights. We had considerable—

Mr. Nickerson: I object to what Burger said.
The Court: Sustained.

Q. Do you know, in the course of your management of the affairs of the airline, how many crews were being reported as being assigned to this operation or— (56) A. To the best of my recollection there were two complete crews assigned to that operation, which would more than cover in the beginning stages.

Q. How many flights per week were contemplated in the beginning stages?

Mr. Nickerson: Your Honor, I object to that. It states it in the contract.

The Court: He may state what was actually done with a view to implementing the contract.

A. We set up for two flights a week but we were told by Mr. Marshall that in all probability we would have to fly three flights a week. That was the reason we would have to have a second airplane within a short time.

Q. Was there an airplane actually assigned to this operation? A. Yes, there was.

Q. Do you know the number of that plane? A. 90436 was the U. S. registry, DC-4.

Q. Just going back again to the signing of this contract, what information did you have available and what information did you utilize in coming to execute this contract? A. The only information we had available was (57) what was given to us in this prospectus and what Marshall told us.

Q. Did you utilize that information in arriving at this— A. That was the basis that we planned and negotiated our actions on, yes.

Q. Do you know the date that this airplane was assigned to this operation? A. I would have to check to see what date it was pulled off the USOA's flights and prepared for export.

Q. We will go into that. A. Sometime in the latter part of July or early August.

Q. Do you have any idea about what was done to that airplane in order to assign it to this operation? A. We renovated the interior of the airplane, I believe we installed additional seats or we changed the seating arrangement at least. We painted the outside, painted the Venezuelan name and flag on it, performed a heavy maintenance check, accumulated a considerable volume of spare parts, loaded them aboard the plane.

Q. Can you tell us what this paper is? (58) A. This is the aircraft logbook.

Q. Of what aircraft? A. Of Aircraft 90436.

Q. Is that the one that was assigned? A. Yes, this is the one.

Q. Can you tell us, with the assistance of this paper, the date this place was first set aside for use in connection with the performing of this contract, the contract with the defendant? A. Yes, I believe so. It was 7/31—that was July 31, 1951. It was given a No. 1 and a No. 5 check.

Q. What does that mean? A. That is a series of maintenance operations which—oh, it is of a minor overhaul

nature, preparing it for this extended operation in Venezuela. So it was assigned to the operation approximately the first of July.

Q. When did it make its first flight and where did it go? A. Wait a second. I may be—I don't believe this logbook shows the Venezuelan flights.

The Court: You can give it from memory if you recall.

A. (Continuing) For two or three weeks we (59) worked on it and then we sent it down to Caracas. I believe it went down around the 16th—between the 15th and the 20th of August it went to Caracas and then it flew—I forget which date—it flew over to Rome. They were supposed to have, Marcano's people told us that they had forty passengers ready for—

Q. Before it left Caracas were there any communications about the passengers that were to be on it at that time? A. Yes, there were. There were some cables between, I believe Waters and me.

Q. Who is Mr. Waters? A. Waters was our communication man, who was assigned to the AVE operation.

Q. Do you have any recollection of what those cables were about?

Mr. Nickerson: Your Honor, I object.

The Court: Sustained.

Mr. Nickerson: Their own man.

The Court: Sustained. We are going into a great deal of detail with respect to matters that should be covered very rapidly. I don't see the purpose of it. Why must there be traced in all this minute detail everything that was actually done? It (60) seems to me that you can get to the point a great deal more quickly than you are.

Mr. Schoenwald: If your Honor please, I propose to show we entered into the performance of the contract.

• • •

Q. After the planes were in Europe, did you receive any communication from any of your employees in Europe or the operation's employees? A. Yes.

The Court: Your question just said "After the planes were in Europe"?

Mr. Schoenwald: After the plane was in Europe.

(61) The Court: The plane?

Mr. Schoenwald: The plane, yes.

The Court: One plane. This is the same plane that went to Caracas in the middle of August.

Q. Can you tell us what this paper is? A. Yes, this is a copy of a tape recording that Mr.— wire recording that Mr. Burger sent to me after he got to Rome and ran into considerable difficulty.

• • •

Q. Did you receive tape recordings with language on it substantially in accordance with the transcript that is now before you? A. I did.

• • •

(62) Q. Did you have any contact with Colonel Marcano after the planes were in Europe? A. I didn't see him until—I sent some wires to him but I didn't see him until September sometime.

The Court: "After the planes were in Europe"?

(63) Mr. Schoenwald: After the plane was in Europe.

Q. Is this document familiar to you? A. Yes.

Q. Can you tell us what it is? A. It is a letter from me to Mr. Marcano dated August 23, 1951.

Mr. Schoenwald: I would like to ask that this be marked in evidence.

(64) The Court: I sustain the objection.

Q. Was there a meeting between you and the Colonel in New York? A. Yes.

Q. About what date was that? A. I would have to check. It was sometime in September. I would say around the middle of September.

Q. Who was present at that meeting? A. R. D. Jones.

Q. Who is Mr. Jones? A. At that time he was with our company. Hs is now vice-president of the United States Overseas Airlines. And Mr. Clemett—I think Clemett was there, I would have to check that—Lloyd Webb, who was a vice-president of U. S. Overseas, and myself.

Q. Who was there on behalf of the defendant? A. Marcano, I believe Marshall, and an attorney, Russell.

Q. Had there been any telephone communications between you or your company and the defendants that (65) you know of immediately prior to this conference in New York? A. Had there been a phone call between me—

Q. Between your company and the defendants, that you have personal knowledge of. A. Yes. We had spoke to Marshall, I believe, in Washington.

Q. I am talking about immediately prior to this conference in New York. Was there a telephone conversation between anybody in your company— A. Oh, yes. Webb was in touch with Marcano, I believe, the same day of the meeting.

Q. Did they have a conference immediately before? How

do you know about this telephone conversation? A. I listened in on an extension in our office.

Q. Would you tell us what the substance of this conversation was. A. Yes.

Q. Indicating who was speaking in each case. A. Webb told Marcano, he said, "I have just driven all night and I have been to Wildwood and the safe was locked," or words to that effect.

Marcano said, "You didn't get something from (66) the safe then?"

He said, "No, they beat us to it."

It turned out that Mr. Marcano had been attempting to get this bill of sale. As a matter of fact, the bill of sale—

Mr. Nickerson: I object to what it turned out.

The Court: Yes, sustained.

Mr. Nickerson: What was said.

The Court: You can only testify as to what was said during this telephone conversation. That is all. Have you finished testifying with respect to the conversation?

The Witness: To the best of my recollection right now. Incidentally, there was a tape recording made of this conversation, if I am not mistaken.

Q. Would you say that this refreshes your recollection and it is a substantially accurate transcript of that conversation which you overheard? A. Yes, this is the conversation.

Mr. Schoenwald: I would like to ask that that be marked in evidence.

Mr. Nickerson: I object to it, your Honor. I think it is a violation of a federal statute.

(67) The Court: Apart from that, the offer is improper. It was shown to the witness for the

purpose of refreshing his recollection. It may be used by him for the purpose of refreshing his recollection; for no other purpose. It cannot be used as primary evidence.

Q. After examining that paper can you add anything to the conversation which you told us you overheard? A. I can.

Q. What can you tell us? A. Webb said to Marcano, "What do you think we can do?"

Marcano said, "Well, I have been talking it over with John Marshall and I think something can be worked out."

Webb said, "Where will me meet?"

Marcano said, "Come over to the Lexington. Marshall is here. We will sit down and get this straightened out some way."

That is about the substance.

Q. Going to this conference that took place that same day up in New York, what was the general subject of discussion at that conference? (68) A. At the conference a little later the substance was, one, we have been told a completely inaccurate story. That is what we said. That is the way we opened the conversation. I talked for a while, Jones talked. We said, "We don't have landing rights in Lisbon, we don't have pickup rights in Bermuda, we don't have—the passengers haven't been produced because there is a rigmarole on exit visas and this requires all sorts of diplomatic clearances. Marcano's papers weren't in order"—

* * *

(69) Q. Tell us what you said in some detail. In other words, what did you complain about?

The Court: No. What did you say and what did they say, indicating in each case who the speaker was.

A. I said the airplane had been delayed for days in Europe. We couldn't procure the traffic. The visas couldn't be secured. There was some sort of a black market operation on visas and immigration permissions. In generating this traffic we had run into very strong opposition by the Italian airline, who threatened to sabotage the entire operation unless we agreed to only one trip a week instead of the contemplated three.

Q. Was there any discussion on your part as to the number of passengers or the presence of them or lack of them? (70) A. Well, I also brought out—I stated that we had had three delays for lack of passengers. Twenty, twenty-five passengers showed up instead of fifty. Then there would be a—we couldn't operate with that type of a load. We didn't have the money; we couldn't subsidize an operation. We reiterated that from the beginning. Although we had a credit card from Marcano for gasoline, we still couldn't make ends meet and take care of these other expenses unless full loads were immediately available westbound.

Eastbound, I complained of the eastbound load. We were told that we had forty passengers eastbound. When it finally ended up, there were two paying passengers and four or five free riders. That was the first eastbound trip.

Mr. Nickerson: I move to strike it out, your Honor.

The Court: Yes. What did Marcano say?

The Witness: Marcano—

Q. What response did they make to this? A. Marcano didn't say much at all. His lawyer, Mr. Russell, said, "You people have a contract. Suppose you start flying," or words to that effect. "You have got to fly a schedule," and he said, "if it (71) is going to take $40,000 of $50,000

to do it, that is your funeral. You have got to do that yourself."

I said, "We can't do it. You knew we couldn't do it. We have to have a sustaining operation from the beginning. Why don't you straighten out these landing rights? Let us sit down and find out what the trouble is. You don't have landing rights in Lisbon, you don't have pickup rights in Bermuda, you don't have passengers out of Rome, as you claimed you had, a blacklog, which would virtually be equivalent to a subsidy."

Q. What did you say—

* * *

Q. What was told to you by Mr. Marcano or Mr. Russell, as the attorney, in Mr. Marcano's presence, for example, with respect to the landing rights? Did they say whether they had them or hadn't them, or anything about them? A. I couldn't get a very satisfactory answer. That was the whole trouble, and I said, "Well, until (72) we do, we just cannot fly. We are going to have to hold the airplane up until we get this thing straightened out."

Q. Did he disagree that they had the rights or they didn't have the rights? A. He wouldn't commit himself. That was the trouble. He didn't have them. We proved he didn't have them because we were sabotaged every time—

Mr. Nickerson: I object to this. This isn't even what he said.

A. —we weren't able to fly on—

The Court: Sustained.

You took the position at this conference, as I understand you, that they didn't have them.

The Witness: Yes, sir.

The Court: And they neither denied that fact nor affirmed it; is that right?

The Witness: That is correct.

The Court: You didn't get from Mr. Russell or Mr. Marcano that they had them or didn't have them?

The Witness: Russell said, "If you don't get that airplane in the air this afternoon we are going to notify the U. S. Air Force."

I said, "What good will that do? What (73) have they got to do with it?"

He says, "We are going to notify the U. S. CAA, Civil Aeronautics Board and the State Department, and we are going to get you into a lot of trouble."

I said, "Mr. Russell, the only trouble any of us are in is this: the traffic isn't there as you represented, and until it is there and until your landing rights are in order, as you represented them, we just can't simply fly."

Q. What did Mr. Russell say in reply to this? A. He said, "Well, you've got to fly. We signed a contract, and you have just got to do it. That is your worry; just get that plane back at Caracas and do it today or there is going to be a lot of trouble."

I said, "I am sorry, but we cannot do it. We don't have the passengers."

Q. Was Mr. Burger in on this conference? A. I think Burger was there, but—

Q. Did he discuss anything about a budget for the future? A. That's right, Burger was there, and Burger said in view of the completely changed situation when (74) we got to Rome we would have to have $60,000 for the next thirty to sixty days or so to finance this operation because it won't even break even, and if we are going to

fly these runs, somebody has got to produce sixty thousand right now.

I said, "We can't produce it. We don't have that kind of money and we never did have."

• • •

Q. Did Mr. Marcano say anything or did his attorney say anything about that? Did they say they would put it up at that time? A. No, they refused to put it up.

We said, "In the first place, since this situation is so completely different, at least the decent thing to do for Marcano would be to forego this $1,500 a trip," and they refused pointblank to do that. They said they wouldn't under any conditions do that.

Q. Did they tell you anything about the suggestions that you made that the rights in the traffic weren't as represented or that more money was needed? Did they say anything which indicated (75) either agreement or disagreement with you on this matter? Did they indicate that the $65,000 was a sound figure, unsound figure, or anything? A. Oh, I believe they agreed that $60,000 would be a very nice figure to spend in the next couple of months; that they would need it.

I said, "Suppose you supply it then."

Q. Was there any discussion as to why the extra money would be needed? A. Simply because this traffic wasn't there and Il Italia had thrown a curve at them and prevented them flying. Il Italia is the scheduled airline from Rome, owned by the—a majority of the stock is owned by the Italian Government, and t' y have very strong say on landing rights—

• • •

(76) The Court: I take it that you will concede that the term represents an Italian airline.

Mr. Nickerson: Yes.

The Court: Competing, perhaps, in Venezuelan Italian air traffic.

Mr. Nickerson: No, your Honor. I admit it is an Italian airline and that it flies from Rome to Caracas.

The Court: All right, then it will stand on that basis.

Q. I think it is important in connection with this conference to advise the Judge of what it was that each person said in particular. Let us get back to this extra $65,000.

First off, who said what the purpose would be? A. For this $60,000?

Q. Yes. Who said what it would be needed for? A. Burger's estimate of the requirements to finance the operation for the next thirty to sixty days was $60,000. $7,800 had to be put up in escrow with the Italian Government for just permission to engage in immigrant traffic, for one thing.

Q. You told us— (77) A. Since we were prevented from flying more than one trip a week, even if we had the traffic there, Burger said, and I believe an agreement was entered into by Marcano and Il Italia on his recommendation that they would have to change about completely, engage in a traffic up into Europe, within Europe, in order to try to pull this thing out of the hole; that it wasn't anything like it had been represented to be, it was a completely new type of operation that would require heavy financing to exploit, develop.

Q. When Mr. Burger said that was there any indication of assent from Mr. Russell or Mr. Marcano as to the need for signing an agreement that would go up to Germany or an agreement with Il Italia or the need for more funds? Did they confirm the fact more funds were needed? A. Yes,

they did, and they confirmed the fact that we would have to change base and see if this traffic out of Munich, I think it was Munich and Hamburg, could be developed, and then, under this agreement worked out with Il Italia, to hold the potential traffic to one trip a week, which Il Italia insisted on, on an equal trip-for-trip basis.

Q. Was an agreement reached with respect to this 78 $65,000 and changing the trips' frequency out of Italy and flying to Germany instead? A. They told us, "You would have to finance it."

I said, "In no way possible can we finance this operation. This was never contemplated. We didn't have the money, and you knew we didn't have it to begin with."

Q. Up to this time had you received any complaint—

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The Witness: I cannot recall anything further at this time except, I believe, everybody stood up and Marcano and his attorney left, with the admonition that "You will hear from us and the courts" or "You will hear later from us," and that ended the conversation to the best of my recollection.

The Court: In other words, the purport of it was you made your complaint and they told you to go (79) ahead and perform?

The Witness: Yes.

The Court: You told them you couldn't perform and it ended on a note of disagreement, without anything being agreed to?

The Witness: That is correct.

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Q. Had you received at that time any complaints from the defendant as to the character of your performance, as to whether or not you were providing airplanes or doing that which you had undertaken to do? A. No, not that I recall. We were, as a matter of fact, ready, willing and able and anxious to carry the flights. Every time they would be delayed or canceled. We just didn't have the traffic nor did we have the rights in half of these places.

Q. Was there another meeting scheduled here in New York? Was there one conference in New York or two? A. I believe there was only one, although we had some telephone calls. Mr. Russell called back. I believe the last communication I had from him was he reiterated that if we didn't get that plane in the (80) air with or without passengers this afternoon, he was going to report us to these various agencies.

Q. Did you give any orders with respect to these planes to continue them in operation? A. The one airplane that was over in Rome at this time, we got in touch with the captain by telephone and I spoke to him and told him to fly the airplane to Frankfurt, Germany and stand by for further instructions, which he did.

Q. Did the plane make any more trips in connection with this operation after that? A. No, the plane had—up to that time the plane had made one roundtrip from Caracas to Rome, and then another trip from Caracas to Rome, and then it went up to Germany.

* * *

(81) Q. Mr. Cox, can you tell us what facts were available to you and what facts you relied upon in arriving at the decision to execute this contract? A. We relied on the printed prospectus by Gotch & Crawford and the conferences with Mr. Marshall.

Q. What particular kinds of information can you easily recollect were among the facts which induced you to enter

into this agreement, as contained either in the prospectus or statements of Mr. Marshall, which you have referred to? A. Well, the operational franchise which AVE had, Mr. Marshall explained, was really the last undeveloped pioneering potentially lucrative field across the South Atlantic from Europe to South America. The fact that they had operated in 1950 lucratively with what they had, with what Marshall himself said was a very unsatisfactory maintenance and operational setup, and interference from partners who they wanted to get out of the picture, and the Government, the Venezuelan Government—sponsored backlog of traffic, (82) which was estimated to be as great as a ten-year traffic—those were the basic facts we relied on.

Q. Was there anything that was told to you that induced you to rely on them? A. Yes. We were told that these facts as exhibited in the brochure or prospectus were—could be assumed to be the bible for the operation and the planning.

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Cross Examination by Mr. Nickerson:

(104) Q. Do you recall that when you went down to see Mr. Marshall that Mr. McCormick was not familiar with the prospectus? A. My recollection is that we all three sat close to an hour and read this, none of us being familiar—

Q. I am asking you whether you recall whether they were familiar with the prospectus prior to the time that you sat down with Mr. Marshall.

• • •

Q. Did they tell you whether they were familiar with the prospectus? A. No.

Q. Do you recall this testimony in your deposition:

"Q. When he got to the meeting was Mr. McCormick familiar with the brochure? A. He didn't appear to be.

"Q. Was Mr. Burger familiar with it? A. Nor did he appear to be."

A. That's correct.

Q. Is that the fact? (105) A. We sat and read the thing for about an hour. None of us, to my recollection, had read it before.

Q. You read it through rather hurriedly, didn't you? A. I wouldn't say that.

Q. Let me refresh your recollection from your deposition at the top of page 96:

"We all sat down and read it, that is, the study, through hurriedly."

Does that refresh your recollection? A. Well, perhaps we did read it hurriedly. I know we read it, and I know I had never seen it before.

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(106) Q. How long had Waters been with you? A. I don't remember. He had just recently been hired while I was in Europe. Probably two or three weeks.

Q. In your conversations with Waters who else participated, about the AVE route? A. Oh, I think Burger was there—yes, Burger, and Clemett, Dan Cox, McCormick.

Q. How many conferences did you hold with Waters prior to the time you saw Mr. Marshall? A. I don't think but one or two. I don't remember now.

Q. Did you discuss the route with him? (107) A. Only in so far as where they went and what route they took.

Q. Did you discuss the stations with him? A. I don't think so.

Q. Do you recall did he tell you how long he had been with AVE at the time he left them? A. No, I can't remember how long he had been with AVE. I think, it

seems to me he had some difficulty with them, though I cannot recall it now.

Q. He told you he had some difficulties? A. It seems to me there was somebody said that but I don't think he was with AVE prior to coming to us. In other words, there was an interval of time there but I cannot remember.

Q. Are you sure of that? A. No, I am not sure of that.

Q. You did have some information about the routes from Waters before you saw Mr. Marshall, did you? A. I don't believe Waters shed any more light on it than did Patton or some of the other pilots, and the gossip of the industry was that they had a route from Caracas to Rome through the Azores and Bermuda.

Q. Didn't he say he was familiar with the various stations along the route? (108) A. Waters was a communications man. He wasn't a pilot. He wasn't in operations.

Mr. Nickerson: Your Honor, may I have an answer to my question?

A. (continuing) So I don't know what Mr. Waters would state.

The Court: Read the question.

(Question read.)

A. I think he did in regard to his communications service and ability.

Q. Did he say whether he had been over the route from time to time? A. I don't remember.

Q. Did he say anything about traffic at the various stations? A. No. I think the only thing stated was that there was a lot of immigrant traffic. That is about all I remember.

Q. Where did he say the immigrant traffic was? A. From Rome to Caracas.

Q. Can you place a date on when he said that? A. No, I cannot.

Q. Can you place an approximate date? A. It would be sometime in the latter part of (109) July, early August.

Q. Prior to the time you saw Mr. Marshall? A. Yes.

Q. Isn't it true, Mr. Cox, that when you got to the meeting with Mr. Marshall that before you even examined the study of Gotch & Crawford that you asked what the deal was that AVE had to make? A. That is what McCormick said. I said that this morning. McCormick said, "What's the deal?" He said, "Read it. Here it is."

Q. And even prior to the time you read the study didn't you say that yourself? Didn't you reiterate what McCormick said? A. I don't think so. I don't recall. Maybe I did.

Q. Let me read— A. We all said, "Well, what is it all about?"

So he says, "Read this thing. Here it is. It has been printed up by these independent people."

Q. Let me read then from your deposition, middle of page 34: "I reiterated what McCormick said. I simply wanted to know what the offer was, what they had to make, what reqiurements there were, in order to determine whether we were interested."

(110) Do you recall testifying in that fashion? A. Yes, I believe that is right.

Q. Do you recall saying at that meeting with Mr. Marshall that you wanted full responsibility for both the operation and the traffic generation? A. Words to that effect. We stated that we wanted complete operational control. We wanted to depart at our determination and not ticket-scalpers. We didn't want a lot of interference, which I had been familiar with before in the industry.

Q. Have you finished? A. Go ahead.

Q. In the study—

Mr. Nickerson: May I have the original, your Honor?

This is a copy I gave to your Honor for your use. I will use a copy, your Honor.

Reading the Plaintiff's Exhibit 357, Mr. Cox, did you read the general outline of proposed operating arrangements on page 17?

A. I read it all.

Q. Can you recall now of your own recollection what was stated, what was proposed in the brochure as to operating arrangements? (111) A. I haven't read this for months. I would have to refresh my recollection on this.

Q. You don't recall in other words—

* * *

Q. Do you recall what was in the outline? A. General outline of proposed operating arrangement.

* * *

(113) Q. Do you recall discussing with Mr. Marshall the question of whether you had sufficient capital to conduct this operation? A. We did.

Q. And didn't Mr. Marshall ask you whether you had sufficient capital to conduct it? (114) A. We discussed it to this extent: I said we—

Q. No. Did he ask you whether you had sufficient capital? A. Sufficient capital—

Q. To conduct operations. A. (continuing) —to operate on the basis that we had full loads at about $2 a mile, at least to break even. On that basis of operating we had sufficient capital. Namely, we had the equipment, we had the pilots, we had the spare parts, we didn't have to go out and buy them, but we didn't have the money to subsidize the operation, and that was understood from the very beginning. As a matter of fact, we were having a

lot of trouble collecting our money from the Government. We were, in effect, broke.

Q. Didn't Mr. Marshall say to you, "You need $250,000"? A. No, he didn't.

Q. Capital. A. If he had said that I would have walked right out because I never saw that kind of money in our treasury.

Q. How many DC-4s did you say you had? A. When you say "you," who do you mean?

(115) Q. USOA. A. USOA didn't have any.

Q. Didn't you state that? A. No.

Q. Wasn't that stated in one of your letters, in the contract? A. Mr. Marshall was well aware the airplanes were owned by Ocean Air Tradeways, a partnership. They had the capital invested in their airplanes. They had no money to expend developing a route for AVE. None of the non-scheds did.

* * *

(116) Q. Ocean Air Tradeways. How many airplanes did Ocean Air Tradeways own? A. They owned four at that time.

Q. Were they free and clear of encumbrances? A. Yes.

Mr. Schoenwald: I am going to object to this line of questioning. Whether or not the airplanes are owned free and clear wouldn't seem to relate to the misrepresentations made.

The Court: It may have some—either weight of extent of reasonableness—bearing on alleged representations. You are attempting to prove a case of fraud. When you get into that area, there are certain latitudes of cross-examination that must be allowed.

Q. Do you recall in your conversation with Mr. Marshall he told you that the Venezuelan embassy or embas-

sies wouldn't show undue partiality or partiality to AVE? A. They wouldn't show it?

Q. Yes. A. On the contrary, he stated that the (117) Venezuelan embassy was very favorable to this operation and were, in effect, highly recommending it and we would get nothing but cooperation and smooth sailing from any—

Q. You are sure of that? A. I am positive of it.

* * *

(118) Q. Do you recall in your conversation with Mr. Marshall that you testified in your deposition that you felt you shouldn't pay $1,500 a trip? A. I stated I felt it was too high.

Q. You proposed $1,000 a trip; do you recall that? A. I did.

Q. Do you recall Mr. Marshall stating that the AVE ran mostly empty eastbound in the prior operation? A. He said their loads eastbound were very light, but that the potential there was very great.

Q. Do you recall this testimony from your deposition, page 37: "They ran empty mostly eastbound"? A. I may have said empty.

Q. Yes. Do you recall asking Mr. Marshall what was meant by an open-end franchise, which is referred to in Plaintiff's Exhibit 357? A. I believe we requested what that meant.

Q. And do you recall this testimony from your deposition, page 38: "He said that what that means is that this run between Rome and Caracas is just the (119) beginning, that is the trunk line, but there is almost unlimited chance of developing runs further"?

Do you recall that testimony? A. That's right.

Q. When you got, Mr. Cox, Defendant's Exhibit C, which you have testified you received, paragraph 3 states: "Of course it would mean placing two aircraft, DC-4's,

on Venezuelan registry, but this sounds pretty good. Bob Prescott and Jim Wooten made a bunchero, as you say down there, so why shouldn't we?"

Did you know to whom the reference was? Do you know who those gentlemen were? A. I know who they are, yes.

Q. Who is Bob Prescott? A. He is with the Flying Tiger line.

Q. Who is Jim Wooten? A. At that time he was operating out in the Near East. He used to be with American Airlines and Alaskan Airlines.

Q. Do you recall in your conversation with Mr. Marshall whether he asked you whether USOA could organize sales? A. Yes.

Q. Do you recall whether you stated that you (120) were going to get a Mr. McDonald to help you in organizing sales? A. That was the plan.

Q. Did Mr. Marshall ever ask you to go down to Venezuela in these first meetings prior to the contract? A. The first meeting? It seems to me—

Q. Any meeting. Did he ask you at any meeting? A. I believe he did suggest Marcano couldn't come up and we should go down there.

Q. When was that? What meeting was that? A. I cannot recall which meeting it was.

Q. Who drafted Defendant's Exhibit G? A. Burger drafted this, to my best recollection.

Q. That is the first letter from Cox to AVE. Did you make— A. From notes which I took in my conversation with Mr. Marshall.

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A. This was drafted by Burger from notes that I gave him that I took when I had a meeting with (121) Marshall.

• • •

(122) Q. After that—you wrote that Defendant's Exhibit G, which is the letter dated July 19th—you had a phone call from Marshall, didn't you? A. That's right.

Q. Do you remember his telling you in that phone call that your estimate of costs which you had given him in the meeting with him was too low? A. Two dollars a mile was too low?

(123) Q. Do you recall his telling you that? A. He never said that whatsoever as a matter of fact.

Q. Are you sure? A. He agreed with me at $1.90 to $2 a mile.

Q. Are you sure of that? A. I am.

Q. Are you positive? A. I am as positive as my recollection can look back to. He didn't tell me our costs were too low, but it is—that operation was a different operation than we had been on previously, so we didn't have an exact set of records to make those exact calculations from.

Q. I will show you Defendant's Exhibit H for identification, which is a copy which you testified in your deposition, I believe, and correct me if I am wrong, is a copy of notes that you took of a phone call with Mr. Marshall. Do you recognize those as such? A. They seem to be.

Q. May I have them? A. May I see it for a second?

Q. May I have them? Item 13, this is in your (124) handwriting, isn't it? A. It looks like it.

Q. "USOA cost figures just about same as US operators. Think USOA estimate too low."

Do you recall his saying that? A. He may have said—

Q. Do you recall whether he did or not? A. Look, if I wrote it down there, I must have written it and he must have said it, but I just don't recollect five years back in those words. However, our agreement on the costs were very close.

Mr. Nickerson: Your Honor, I move to strike out the last as not responsive.

The Court: I will allow it to stand.

Mr. Schoenwald: Are you offering the document in evidence?

Mr. Nickerson: No.

Q. When, Mr. Cox, when you discussed Defendant's Exhibit G, which is the letter of July 19th, with Mr. Burger, writing this with Mr. Burger—did you discuss it with Mr. Burger? I will ask you that first. A. Yes.

Q. Did you discuss with him a $3,000 per week guarantee payment? A. Yes.

(125) Q. Did you say to Mr. Burger that you thought that was too high? A. Yes.

Q. But you put it in the letter? A. We were told it either went in or we didn't have a deal. We had to put it in.

Q. Then did you discuss that matter before you or at the time you were preparing Defendant's Exhibit I, which is the letter dated July 21, 1951? A. I probably did.

Q. Did you tell Mr. Burger you thought it was too high then? A. I told everybody I thought it was too high, including Mr. Burger.

Mr. Schoenwald: Perhaps the witness could answer these questions with more facility and accuracy if he had copies of the letters in front of him.

Would you want to make those available, Mr. Nickerson?

Mr. Nickerson: No.

The Court: I will allow Mr. Nickerson to conduct the examination in his own way.

* * *

(129) Q. Mr. Cox, do you recall that Mr. Waters developed an analysis—Mr. Waters and Mr. Burger de-

veloped an analysis of the operation for you after you signed the contract? A. It seems to me I remember them developing some analysis but when it was I couldn't recall.

Q. I show you Defendant's Exhibit O for identification and ask you whether you received the original of that.

Mr. Schoenwald: Did you say that was after the contract was signed?

Q. Do you recall ever reading the first page, Mr. Cox, or the last one—whether you received it?

Mr. Schoenwald: If this is a document received after the execution of the contract, I doubt very much that it is admissible or whether it is a proper subject of cross-examination.

The Court: Overruled.

A. This I recall receiving from Burger.

Mr. Nickerson: I offer that in evidence.

Mr. Schoenwald: I object to the admission of this document.

The Court: On what ground, irrelevant?

Mr. Schoenwald: It is subsequent to the (130) execution of the contract and the witness hasn't shown sufficient knowledge of its contents to charge him with knowledge or familiarity.

The Court: Overruled.

(Received in evidence as Defendant's Exhibit O.)

(A short recess.)

By Mr. Nickerson:

Q. Is Mr. Clemett with you? A. No.

Q. When did he leave? A. Sometime around mid-1952. I think it was June 1952.

Q. Is Mr. Webb still with you? A. He left at the same time.

Q. Burger still with you? A. Burger isn't with us now.

Q. Waters is with you? A. No.

Q. McCormick? A. No.

Q. I show you Defendant's Exhibit P for identification.

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(134) Q. Do you recall when you went down to Caracas that you didn't discuss with Colonel Marcano the question of whether there were rights in Portugal at that time? Do you recall that? A. We were told by Mr. Marcano that he had or AVE had landing rights in every single station that (135) was mentioned in the brochure.

Q. Let me read from your deposition, page 181:

"Q. Did he (referring to Marcano) say that the landing rights in Portugal were in order? Was that discussed? A. I don't think we discussed Portugal other than just a fuel—as a fuel stop because it wasn't contemplated at that time to use Portugal as a passenger or traffic stop, but there was nothing said about Portugal not having the rights."

Do you recall that testimony? A. Yes, yes.

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(136) Q. When you went down to Caracas did you get certain letters of introduction from Colonel Marcano? A. It seems to me we did.

Q. Did you ask him for them? A. I think he volunteered them. I don't know if we asked him first or just how that was arrived at.

Q. When you went down to Caracas did you go into the CAVE offices? A. We were down around the offices, yes.

Q. Did you meet any of the CAVE personnel down there? A. We met two or three of the AVE personnel.

Q. Did you meet Mr. Morgan? A. I believe so.

Q. Did you know what his job was? A. He was introduced as the accountant, I believe.

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(140) The Court: There is a word that is slightly obliterated on the second line. Can you make that out?

Mr. Nickerson: On the second line, "for the flight from Caracas to Rome on August 19th."

The Court: No, the word before "load."

Mr. Nickerson: ". . . with a near full load."

The Court: ". . . with a near full"?

Mr. Nickerson: Yes.

Is that correct?

Mr. Schoenwald: I am sorry.

Mr. Nickerson: Does that say "a near full load of passengers"?

(141) Mr. Schoenwald: All right, yes, I will take that.

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Q. Mr. Cox, on your direct testimony you testified about a meeting in New York at which Mr. Marshall and Colonel Marcano were present, and also Mr. Russell. Do you recall your testimony in that respect? A. Yes.

Q. Do you recall that in that meeting you stated to Mr. Russell or Mr. Marshall or Colonel Marcano that the basic trouble with the AVE operation, as far as you were concerned, was that passengers did not materialize? Do you recall that? A. I believe so.

(142) Q. Do you recall telling Mr. Webb some time prior to that that it didn't look like so much money was going to be made on the AVE operation and you thought you should make more money on the Korean airlift? Do you recall that? A. No, I don't.

Q. Are you sure of that? A. I am quite sure.

Q. Do you recall telling Webb some time prior to this meeting with Mr. Russell that you were going to pull the plane off the AVE route? A. I told Webb this prior to the meeting? I discussed the suspension of the operation with Webb unless many of these things were clarified which we had run into, and these troubles, and landing rights discrepancies.

Q. Do you recall telling him that you were pulling out because you could make more money on the Korean airlift? A. No, I don't.

Q. Are you sure of that? A. As a matter of fact, I am quite sure I didn't tell him that at all. Webb was down there to protect the airplane.

(143) Q. Have you read Mr. Webb's deposition? A. I think I read it some time ago.

Q. Do you know when it was that you applied to reregister the airplane, which was on the AVE route, when you applied to reregister it under American registry? A. Must have been the latter part of September or early October.

Q. Who was it that you asked to attempt to do that? A. I think we asked Clemett, who was over there in Europe at the time, if I am not mistaken.

Q. You are sure it wasn't about the time of his leaving that you told someone to reregister it under U. S. registry? A. I don't think so.

Q. Do you recall at that meeting at which, Mr. Russell was present, Mr. Cox, whether anything was said about a moratorium on the $3,000 a week? A. Yes. We requested that they forego that and they refused to do that.

Q. I show you Defendant's Exhibit AY for identification and ask you if you received the original. A. We received it.

(144) Mr. Nickerson: I offer that in evidence.

Mr. Schoenwald: No objection. I wonder if you would establish the date when that was received.

(Received in evidence as Defendant's Exhibit AY.)

* * *

(155) RALPH COX, JR. resumed.

Re-direct Examination by Mr. Schoenwald:

Q. Mr. Cox, did anyone, including Colonel Marcano, John Marshall or anyone on your staff tell you at any time that before the signing of a contract anything which was inconsistent with the prospectus which you were testifying about yesterday?

Mr. Nickerson: I object to what his staff told him.

The Court: You are asking for a conclusory statement.

Mr. Nickerson: I object.

The Court: Saying whether it was consistent (156) or inconsistent, Mr. Cox would be expressing an opinion. It doesn't lie in his mouth to express an opinion as to what was consistent or inconsistent. He has already stated what he was told. I sustain the objection.

Q. Were any facts brought to your attention dealing with the subject matter of the prospectus in addition to what you have already testified as to what Mr. Marshall

told you during those conferences other than that which you have told us already?

* * *

A. No, I cannot recall of a thing.

* * *

(157) Mr. Schoenwald: I refer to page 88 nd the two paragraphs in the middle of that page:

"He said that openly the Venezuelan Embassies and Consulates would probably not embarrass themselves too much by showing partiality to AVE. In actuality, though, there would be a great advantage since some Venezuelans are very nationalistic and they are prone to patronize their own industry. He also mentioned that AVE, through diplomatic and government pressure, had been able to throw Trans-Ocean Airlines out of the picture between Rome and Caracas and that further enhanced the traffic potentialities of AVE. We were told that the AVE traffic organization was very much intact. Mr. Marshall elaborated somewhat on the reference on page 8 to the traffic setup already existing. Mr. Marshall stated that although the records showed they carried (158) an average of 18 passengers a trip, right now, that is, as of July, 1951, there were backlogs in Caracas for Europe, since Alitalia is the only other airline running directly and was carrying very high loads, 90 to 100 per cent."

On page 117, "Fritz and Sanour".

* * *

Re-cross Examination by Mr. Nickerson:

(160) Q. I show you Defendant's Exhibit AI for identification and ask you if you sent that to Colonel Marcano

and, if so, about what date? A. I probably sent this—it looks like it is dated the 11th of September but I cannot recall it.

Mr. Nickerson: I offer it in evidence.

Mr. Schoenwald: Just a moment. May we get a date on this?

Mr. Nickerson: I believe it is August 22nd. (161) If you will look in your file, you will see it is.

Mr. Schoenwald: We don't have any objection.

(Marked Defendant's Exhibit AI in evidence.)

Q. After you sent that cable did you go to Rome? A. I received no answer to that cable, if I recall correctly, and I didn't go to Rome. Other arrangements were made.

Q. I didn't ask you, Mr. Cox, whether you had received an answer. I asked you whether you went to Rome. A. I didn't go to Rome.

Q. Did you depart from Newark the day following the day you sent this? A. Depart to where, Rome?

Q. Yes. A. I didn't go to Rome, so I didn't depart Newark.

Q. In the period of July 25th through September 14th were you in Europe at all? A. No.

Q. All the information that you got with respect to the AVE operation in Europe during that period was from Mr. Burger, isn't that right?

Mr. Schoenwald: Objection, your Honor. The witness hasn't testified as to any of the events (162) occurring in Europe or about any information he got of events occurring in Europe. That question seems to assume that state of facts.

The Court: No, it doesn't. There has been a great deal put into the record already about com-

munications and contacts which Mr. Cox had with other persons who were in Europe. It doesn't assume anything. It is asking him whether the source of any information he obtained concerning what went on in Europe was from another person. The question, I think, is a proper one.

Do you remember the question?

(Question read.)

A. No, it isn't right. I got information from not only Burger, but when Webb returned from Caracas I got information from him.

Q. Webb was in Europe, was he? A. I said when Webb returned from Caracas.

Q. Was Webb in Europe? A. No, he wasn't in Europe.

Q. So he didn't know what was going on in Europe except what was told to him? A. It was told to him by the crew when they returned from Caracas.

(163) Q. With respect to people who were over in Europe during the period from when the plane first left Caracas, on August 19th, I believe, through September 14th, which was, I believe, the date when you met with Colonel Marcano and Mr. Marshall in New York, did you have any information directly from people who were in Europe concerned with the AVE operation other than Mr. Burger? A. It seems to me I talked to Van Boheman on the long distance phone at the same time I talked to Burger, and then I talked to Campas on the long distance phone.

Mr. Nickerson: May I have just one second, your Honor? I am sorry.

I refer to your deposition, page 281, the second question:

"Q. Did you talk with anyone other than Burger during

that period, that is, August 14th through September, 1951, over the phone in Rome? A. No."

Do you recall that testimony? A. I don't recall it, but if it is—took place at that time, Burger was the main contact. He sent a tape or a wire recording back, but I say I had a talk.

(164) Q. "Q. In Europe did you talk relating to this matter with anyone other than Burger August 14th through September, 1951? A. Not to my knowledge or recollection, I didn't."

Do you recall that testimony? A. No, I don't recall it, but if it is in there I must have said it, but I would like to say this that I may have—

Mr. Nickerson: I object.

A. (Continuing)—spoken to Van Boheman.

Mr. Nickerson: (Continuing) To anything that can be brought out on its own case.

The Court: If you want to add anything, I will give you a chance to go with your lawyer and bring it out after you are finished.

Q. Isn't it true that at the meeting attended in New York on or about September 14, 1951, which Mr. Marshall and Colonel Marcano were at, that Mr. Burger expressed himself as being very enthusiastic as to the potential of the AVE operation in Europe? A. Enthusiastic? If somebody raised at least $65,000 and Marcano straightened out all the indiscrepancies, potentially it had a good future if there was good faith on the other side. That is why we (165) had the meeting.

Q. Do you recall that Mr. Burger resigned right after that meeting? A. Mr. Burger resigned shortly thereafter.

Q. Do you recall at the time he resigned he told you he was resigning because he thought you did the wrong thing by pulling out of the operation? A. By not raising $65,000, which we weren't able to do. Burger wanted to make it succeed. We all did.

Q. When the plane was moved from Rome, I believe it was, to Frankfort, you used Colonel Marcano's credit card for gas, didn't you? A. I don't know whose gas—Campas had a credit card from AVE, so he probably used it.

Q. You used it for flights of that airplane after it left Frankfort, didn't you? A. He may very well have.

Q. After you pulled out of the contract? A. Of course, we didn't get one dime of the recipts, incidentally, either.

Mr. Nickerson: I have no further questions.

Mr. Schoenwald: Colonel Marcano.

The Court: May I ask, while Mr. Cox is on the stand, just one question?

(166) By the Court:

Q. Mr. Cox, before you had this meeting at the home of Mr. Marshall in Washington, is it fair to say that you had a fairly good idea of the operations of AVE on this trans-Atlantic run prior to the time they stopped operating? A. No, sir; not to this—to this extent I had information: I knew there was such an operation. I had heard through the so-called gossip of the industry that Trans-Ocean Airlines and Near East had participated in some—excuse me, Flying Tiger line and Near East had participated in an AVE operation. I knew that Trans-Ocean independently, as an American airline, had flown those routes. I knew that we had hired two or three former crew members from the AVE operation but I knew none of the particulars. I never heard of Marcano other than a name, and I think

only a couple of weeks prior to my meeting with Marshall, perhaps a month, all we knew was there was an operation, it had ceased, and they were looking for someone to come in.

Q. Did you not on your own initiative make an investigation with a view to ascertaining the potential earning power of such an operation? A. Yes, I instructed McCormick to get as direct (167) as he could contact with this—with the principals and he proceeded to do so through Marshall.

Q. That was before your meeting with Mr. Marshall? A. That was prior to my meeting—

Q. The purpose of undertaking such an investigation was to acquire as much information as you could with a view to assisting you in carrying out these negotiations, wasn't it? A. That is correct.

Q. The money that was spent for the purpose of painting the airplane, renovating the seats, carrying out the mechanical checkup and all the other things that were done prior to the transfer of the plane and the crews to Venezuela and to Rome, was that money out-of-pocket sustained by you or was it money that was advanced to you by Mr. Marcano's company? A. It was money out of our pocket. We didn't have any funds advanced of any sort by AVE.

Q. Were you paid any funds at any time by AVE? A. No, sir, we were never paid any funds.

Q. This contract was denounced or at least declared to be at an end at what time by the Marcano Company, by CAVE and AVE? A. By AVE's side? That I couldn't say.

(168) Mr. Nickerson: I didn't get the question.

The Court: This contract was denounced or declared to be terminated formally by CAVE and AVE, was it not?

Mr. Nickerson: No, we never did, your Honor. You have a letter in the files in which, after they

had rescinded it, after they rescinded it, and we have a letter that has not yet been introduced because it was not written by Mr. Cox, in which they formally purport to rescind it, and Mr. Marshall sent the letter exercising the option with respect to the two airplanes.

The Court: But wasn't there a paper introduced in evidence yesterday to the effect that this contract was formally declared to be at an end, terminated?

Mr. Nickerson: That may be in the documents of Mr. Marshall and I will get that out. That would be the only—yes, your Honor, you are correct. On September 17th, and it is in this letter of Mr. Marshall's in which he states that they failed to live up to the contract, AY.

The Court: So as of September 17, 1951, the defendants formally took the position that this contract was at an end.

Mr. Nickerson: Yes, they had had phone (169) calls, your Honor, from—

The Court: Whatever the explanation is, that was the first formal indication.

All right.

Mr. Nickerson: First written one.

Mr. Schoenwald: Just one question suggested by something your Honor said.

Re-direct Examination by Mr. Schoenwald:

Q. Namely, was there any effort to buy the airplanes at that conference in New York in September by the defendants? Did they seek to buy the airplanes at that time? A. There was a discussion about purchasing DC-4 aircraft.

Q. Who initiated that discussion? A. I don't know whether Mr. Jones or Mr. Marshall initiated it but Jones

said that he could produce three DC-4s for AVE on very short notice, if they wanted to buy, and he mentioned, "Do you have the money? If so, in effect," put it on the line and we will produce airplanes.

Q. What was the response to that request to put up the money? A. The response was, to the best of my recollection, (170) either just—I don't think they said they don't have the money. I believe it was just silent. There was no offer to put money up, when he said, "We'll have to have the money," or, "Put it on the line." There was no offer to do so.

Q. When you received the letter, which is Exhibit No. AY, was there any money sent with it or any— A. No, sir.

Mr. Nickerson: I object to that.

The Court: I will allow it. And prior to that letter was there any attempt by anyone in behalf of the defendants, AVE or CAVE or Colonel Marcano, to exercise the option to purchase the planes, prior to this letter?

A. Of the 17th?

Mr. Nickerson: September 17th.

The Witness: No, sir, there was not.

The Court: That is Exhibit AY. You know the letter I have just looked at before; you have that in mind?

The Witness: Yes, sir.

The Court: The one signed by Mr. Marshall declaring the contract was at an end.

(171) The Witness: In which he said he wanted these planes produced or made available to purchase?

The Court: Yes.

The Witness: We never heard anything prior to that time except this discussion which took place that I just referred to.

The Court: And that discussion ended up with no action, with no decision, is that right?

The Witness: That is correct, sir.

The Court: Do you want to confer with your counsel a minute to bring out anything you may have in mind?

Mr. Schoenwald: We have finished, your Honor. I am now ready to proceed with Colonel Marcano.

(Witness excused.)

JORGE MARCANO, called as a witness by the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Schoenwald:

Q. Colonel Marcano—

* * *

(172) Q. What was the highest administrative position you held in the military? A. In the military I was inspector general of aviation and director of the military school of aviation.

Q. Did you, in the course of being inspector (173) general do consider type of work, examine books, personnel and so forth? A. Yes, I had to do that, administrative work.

Q. You had some business positions too, hadn't you, Colonel? Isn't that right? A. Yes.

Q. As a matter of fact, you have some business positions right now, don't you? A. I have.

Q. You are administrator of a canning company, isn't that right? A. Yes, I am.

Q. You have other business positions. Will you tell us a little bit about what they are? A. After I left the military I went—I was president of CAVE. After that I left for Europe and I stayed in Europe for two years, coming back in 1944, and I have been general manager of this commercial outfit since then. Aside from that I am chairman of the board of a company of air mapping, of a glass factory—I am director of the board of a glass factory; director of the board of a vinegar company, that makes vinegar. That is about all.

Q. During the course of your duties you look at (174) accounting statements, the books of account, and speak to executive officials in the companies about the business affairs of the company? A. I have to, yes.

Q. You can read such papers and you are familiar with them, aren't you? A. I am familiar with the papers that I have to examine.

Q. Will you tell us how you first came into CAVE? At what time did you first acquire stock or have any connection with the company? A. The only time I ever had any connection with the company must have been around September, October, 1949.

Q. Did you acquire stock at that time?

Mr. Nickerson: I think this is a little bit remote. I have no objection, if your Honor doesn't, to the time in it.

The Court: It is only one question. Let us see. Try not to dwell on preliminary and remote matters.

Q. Will you tell us when you first acquired stock in the company? A. I first acquired stock in the company at the (175) end of 1949.

Q. Previous, immediately previous, to your acquiring stock in the company you were minister of communications,

were you not? A. No, I was military delegate to the United Nations.

Q. During 1949 you were minister of communications, weren't you? A. Yes, I was.

Q. Same year that you acquired stock in the company, is that right? A. Yes.

Q. While you were minister of communications you were familiar with the procedures in the office of the ministry, weren't you? A. I was.

Q. And with its records and its files. When did—I would like to ask something about the other stockholders of the company. At the time you came into it, who were they?

Mr. Nickerson: I don't think this is relevant.

Mr. Schoenwald: Your Honor, I think that I can connect up the relevance and it would, perhaps, (176) be unfair to my client and to the Court to advise this witness at this time, but the stock holdings in this company are one of the issues in this case. As a matter of fact, I think you will find the contract contains an option to acquire stock; and the prospectus relates to holdings of stock in this company.

The Court: You are not suing for specific performance, are you?

Mr. Schoenwald: Among other things, we are contending that we were given an option to buy stock which option was incapable of being performed. In other words, that it couldn't be delivered, and I think I am going to be able to point out facts to demonstrate it.

Mr. Nickerson: That is an issue, and I don't see how it possibly can be, if that is an issue, it is as of the time the contract was entered into, not way back in 1949 or 1950.

The Court: I suppose Mr. Schoenwald is representing that he can connect it up to the time of the contract. Is that your representation?

Mr. Schoenwald: We want to show, if your Honor please, the shares that were held at the time of the contract; and by what is done with them it will (177) be necessary to show you the stockholders and the exact number of shares held.

The Court: Why not show them as of the time of the contract first, and then if you have to show them any further, you may go into that. Come to grips with the precise factual situation.

Mr. Schoenwald: I think what I would like to do, and if counsel will bear with me, is to identify some of the personalities connected with this company. from time to time we are going to introduce statements and communications with them that will have only meaning in context.

The Court: You are not going to explore the history of this company for the sake of hearing about these personalities unless they can be shown to have some direct bearing on the issues of this case.

Mr. Schoenwald: Each of the personalities made communications which are going to be in evidence anyway. We can introduce the communication—

The Court: You say they are going to be introduced. I don't know whether they are going to be introduced. That depends on how relevant they are.

Mr. Schoenwald: I plan to offer them.

The Court: Do they have anything to do with (178) the formation of the contract or the action taken by the parties pursuant to the contract?

Mr. Schoenwald: If your Honor pleases, they have to do with the accuracy of the representations

contained in the prospectus. There are communications which the Colonel received, and which were issued by the company; and in the company's files are contained the data for all the vital terms of a prospectus. The chief source of knowledge which is available to us in this action, to demonstrate the falsity of the contents of the prospectus, are records of the defendant or entries, and notes and memoranda signed by the officers of the company. We have to demonstrate and—

The Court: May I suggest, then, that you first direct the witness' attention to a specific, relevant provision of the prospectus and then, if necessary, you may go back, but I think that you have got to establish the basis of relevance first and not take us through this long, historical exploration before we find out what the relevance is.

Mr. Schoenwald: Would you provide the Colonel with a copy of the prospectus?

Mr. Nickerson: Does your Honor have a copy?

The Court: Yes.

(179) Q. Did you ask to have this prospectus made? A. I did.

Q. Did you instruct John Marshall to cooperate in its preparation? A. I asked Mr. John Marshall to look for somebody who was qualified to do a study like this.

Q. As a matter of fact, had you received communications from the plaintiffs in this action inquiring about this airline before the prospectus was prepared? A. Yes.

Q. And did you indicate to them that they were to defer communicating or negotiating until you could present them with that prospectus? A. Yes.

Q. Did you tell John Marshall to stop or to defer all such communications or negotiations until the prospectus could be furnished?

* * *

Q. Do you remember the question, Colonel? A. I would like to have it read back.

(180) (Question read.)
(Question read.)

A. Yes, I had directed Mr. Marshall not to go into any kind of negotiation until we had this prospectus out.

Q. Did you authorize anyone other than John Marshall or yourself to negotiate or to furnish information with respect to this contract? A. No.

Q. Did any of the employees of your company, such as Mr., let us take Mr. Waters—what were Mr. Waters' duties when he worked for AVE? A. He was radio operator at first. Then he was chief of communications in AVE.

Q. He was discharged, wasn't he? A. Yes, he was.

Q. Before the company ceased operating? A. Yes.

Q. As a radio operator and chief of communications was he familiar with or did he work with the finances of the company? A. With the finances? No.

Q. Did he work with traffic procurement of the company? A. No.

(181) Q. Did he have an opportunity to learn anything about the legal status about the company, its franchise or traffic rights? A. He had an opportunity, yes. He was very inquisitive, and he even wrote me a memorandum but he had nothing to do with it.

Q. Did you furnish him with information about these affairs? A. I did not.

Q. To the best of your knowledge did anybody in the company give him information about these affairs?

Mr. Nickerson: What are these "affairs"? I am sorry.

Mr. Schoenwald: Franchise, and the traffic rights, and finances of the company.

A. I don't know who furnished him with that but he was very familiar with them from the report he wrote to me.

Q. Have you got a copy of that report? A. No, I have not.

Mr. Schoenwald: Do you have it in your file?

Mr. Nickerson: Not that I know of.

Q. Was he familiar with the finances of the company? (182) A. I wouldn't say he was familiar with the finances of the company.

Q. Why did you fire him?

Mr. Nickerson: I object to it as irrelevant.

The Court: You first should ask him when—whether he discharged him, when he discharged him.

Mr. Schoenwald: I think he previously testified he had discharged him. I would like to ask him when.

The Court: When?

Q. When did you discharge him? A. I don't remember.

Q. It was in the early stages of the operations of the company, wasn't it? A. Well, I remember the end of the company, I mean, the end of the operation, he was still with us.

Q. You mean you rehired him? A. We may have. I don't remember.

* * * *

Q. You did sign this letter appearing on the first (183) page of the prospectus, did you not? A. Yes, I did sign it.

Q. Before signing it you examined the prospectus, isn't that right? A. Yes, of course.

Q. As a matter of fact, you had a conference with Gotch and Crawford in which you submitted to them most of the material which appears in the prospectus? A. The material which appears in this prospectus has two sources.

Q. Two sources? A. Two sources. One was my personal experience with AVE but which I gave to Mr. Gotch and Mr. Crawford; and, two, meetings we had, I had given them, to my best recollection, to my best knowledge, everything that had happened in CAVE by word. Then he required certain amounts of accounting or information about statisticals and so forth, which I got from my bookkeeping—

Q. You examined that account—

* * *

The Witness: Which I required from my bookkeeping in Caracas, from Mr. Morgan.

Q. You examined that bookkeeping material too? (184) A. I wasn't qualified to examine it.

Q. So you didn't look at it? A. I looked at it but I wasn't qualified to examine it. I asked for it from my bookkeeping department in Caracas and I got it. It was right, what they told me. I instructed them what to get.

Q. How did you know it was right? I think you just said it was right. A. Because I instructed Mr. Morgan, who was my accountant exactly what kind of information we wanted.

Q. As a member of the board of directors of several corporations you are familiar with profit and loss statements, aren't you? A. Yes, I am.

Q. You could tell whether or not these were accurate profit and loss statements? A. If you ask for the statement, I will say they are accurate.

Q. And the balance sheets that were submitted were accurate? A. Balance sheet is accurate, yes.

Q. You looked at it? A. Yes.

Q. In the course of your duties in connection (185) with the ministry of communications you were familiar with the publication called the Gazetta Officiale? A. Yes.

Q. What is the nature of that publication? A. It is the official journal of the government.

Q. What kind of material appears in that official journal of the government? What do they publish in that? A. They publish all official documents.

Q. And if you want to find out whether a document is official you refer to the Gazetta Officiale, is that right? A. Well, that is a point—

* * * *

(186) A. (Continuing) The official gazette is—all official documents are not in the official gazette.

Q. The franchises appear in the official gazette? A. Yes, they do.

Q. Would you say that if a franchise does not appear in the official gazette then it is not yet an official franchise? Isn't that right?

* * * *

A. I wouldn't know what to answer that because it is a point of law that I would rather have a Venezuelan lawyer answer, not myself.

(187) The Court: But if it does appear in the official gazette then you have no question—

The Witness: It is official.

The Court: At that point it is official?

The Witness: It is official.

Q. I would like to read from your deposition, Colonel, and see if this helps you.

Mr. Schoenwald: Referring to the franchise, on page 919.

Mr. Nickerson: Just a moment.

Q. (Continued) "I keep saying I don't know if I have a copy of it."

Mr. Nickerson: This is Mr. Schoenwald speaking?
Mr. Schoenwald: Yes.

Q. (Continuing) "I have a copy of the paper which deals with that.

"Mr. Nickerson: Maybe we can write down to Venezuela. Who would have the actual copy of the franchise?

"The Witness," Who was the Colonel, "The official gazette is the best source."

Does that help you remember whether or not the official gazette is where—is the place where an (188) official copy of a franchise would have to be published? A. Would be published, if it is published. That is what I said. It is the best source.

Q. Was the franchise of AVE published in the official gazette? A. I don't recall.

Q. Have you made any effort to find out? A. No, I have not.

Mr. Schoenwald: I call upon you to produce your franchise of the defendant.

Mr. Nickerson: Your Honor, I am producing documents, some of which have been officially translated and some of which have been translated by Colonel Marcano. If I might ask him a preliminary question with respect to his capacity to translate them.

The Court: Yes.

By Mr. Nickerson:

Q. Colonel Marcano, were you educated in the English language at all? A. No, I wasn't early.

Q. You took it, didn't you? A. Yes, I took it in navy school for five years.

Q. When did you first learn English? A. When I was in the navy school.

(189) Q. What year was that? A. In 1923.

Q. Have you spoken English since that time? A. Yes, very often.

Q. Have you lived in the United States? A. For about 12 years, yes.

Q. Has any part of your reading been English? A. Most of my reading is in English.

Q. Have you translated documents from Spanish into English and from English into Spanish? A. Yes, several times.

Q. Do you recall you made certain translations of documents which are in my file? A. I do.

Q. Are those translations accurate? A. I assume—I think they are accurate translations.

Mr. Nickerson: I produce document dated October 26, 1949; document dated November 30, 1949; document dated June 21, 1950; document dated August 8, 1950; and document dated August 18, 1951.

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(190) Q. Colonel, does this company operate in—tell me what period did the company operate its international regularly scheduled business? A. I didn't—what?

Q. During what period did the company operate its regularly scheduled international business? A. Since February, 1950, to May, 1951.

Q. You know that the prospectus doesn't say that, don't you? A. Doesn't say what?

Q. The prospectus—

The Court: Whatever the prospectus doesn't say is a matter from which you can argue later.

Mr. Schoenwald: I would like to direct your Honor's attention to page 5 of the prospectus.

The Court: Can't you do that when you argue the evidence?

Mr. Schoenwald: Your Honor, I would like to cross-examine this witness dealing with why the discrepancy has come to exist. The only way—

The Court: Direct his attention.

(191) Q. I would like to direct your attention to the sentence of paragraph 5 stating that operations were continued during 1951 on a charter basis until the spring. You see that sentence? A. Yes, I see it.

Q. Can you tell us how it came to be that you indicated that operations were only on a charter basis during 1951? A. It is a word that slipped in there somehow but because we continued on—it wasn't very regular because of cancellations, but we kept our schedule as far as we could keep it up to May.

Q. It appears elsewhere in this prospectus, does it not, that operations continued only on a charter basis during 1951 and all your statistics relate only to 1950, isn't that correct?

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(194) Q. I also bring to your attention, on page 2, the third numbered paragraph. Do you have that before you? A. No. 3?

Q. Page 2, the third numbered paragraph. A. Yes.

Q. Apparently it also appears there that the company found it imprudent to continue scheduled operations during 1951. Can you explain the presence of this second statement, that the corporation didn't continue scheduled operations during 1951 when you told us that they did?

A. We did until May. We didn't continue in 1951 because we sold the airplane.

Q. I am confused. I am asking you about scheduled operations. I thought you told me that you (195) didn't have a scheduled operation during 1951. Did you or did you not? A. We did.

Q. You did have scheduled operations? A. From January to May—April, May, 1951.

Q. Can you explain why, then, the prospectus contains two statements to the effect that you did not continue scheduled operations during 1951? A. Maybe when I read this I understood it was after May because we couldn't continue scheduled operation.

* * *

(196) Q. Colonel, can you give us any explanation as to why there is no report of your operating gross income or your operating net income during 1951? A. This study was made to show the normal operation of the company which we thought was more representative of normal operation when we had good maintenance and we didn't have so many cancellations and so forth. So we took March-September, 1950, as such as the basis in the study. And later on, due to lack of maintenance, lack of capital and other causes, 1951 was not a year that could be taken as a basis for a study. You see loss in 1951 of $62,553 up to June, 1951.

Q. Then you deliberately omitted the report in 1951 because you thought that it was adverse to the (197) company because of certain reasons? A. Not adverse to the company. It wouldn't show what the operation really could make.

Q. But the non-reporting of 1951 was not an accident? This was intentional, wasn't it? A. Of course. We didn't report 1951, yes. In our statement, if you see, you can see lost, 1951, $62,553.

Q. And this also, I understand, explains why you said that only scheduled operations discontinued in 1951, is that right?

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Mr. Nickerson: What is explained?

A. I don't understand it, I am sorry.

Q. You told us that conditions during 1951 weren't good, is that right? And I ask you now, is that why you put in the prospectus that you didn't have scheduled operations during 1951? A. No, it was not because I didn't put it.

Q. But you read it? A. I read it.

Q. And you made no efforts to correct it? A. That's right. You are right.

(198) The Court: You actually reported a loss on your 1951 operations?

The Witness: Yes, sir.

The Court: And you showed that they—what your report purported to show was that they weren't typical of your normal operations?

The Witness: That is right.

The Court: Your normal and typical represented by from March to September, 1950.

The Witness: It says so in the study.

The Court: That is what you claim the study purported to show—

The Witness: Yes.

The Court: (Continuing)—typical normal operation.

The Witness: And the income.

The Court: And the 1951 operation, which you reported to be a loss.

The Witness: Yes.

Mr. Schoenwald: I think there was a slight mistake in the question. You assumed something. There is nothing there which indicates that there is an operating loss during 1951. There is a reference to a loss—

(199) The Court: Will you point out, please, Colonel Marcano—

The Witness: Yes, I will read—

The Court: (Continuing)—where the 1951 loss is referred to so that can be—

Mr. Nickerson: I have it in hand, if your Honor wants it. It is the balance sheet following page 5.

The Court: Let Colonel Marcano make it part of his testimony. Is it in the balance sheet?

The Witness: In the balance sheet, yes, sir.

The Court: What is the loss that is reported?

The Witness: Reported as $62,353, 1951 up to June 15th.

Mr. Nickerson: 553.

The Witness: 553.

Right here, sir (indicating).

The Court: Yes, I see.

The Witness: And it says here, if I may read this: "During the last three months of 1950 scheduled performance suffered badly as the result of accumulated maintenance, inadequate parts levels, and inadequate maintenance facilities. The company was performing all (200) its own maintenance."

That is on page 5, the first and second paragraphs, third paragraph.

Mr. Nickerson: First paragraph; last sentence on page 5.

The Witness: On page 5, I am sorry, sir, right here.

Mr. Nickerson: First paragraph on page 5, last sentence.

The Court: Yes, I see. Go ahead.

Mr. Schoenwald: Why I tried to bring out, your Honor, is that the previous language, with reference to operating income and operating loss, the notation on the balance sheet, on page 5, indicating the loss of $62,353, is not an operating figure and, as a matter of fact one cannot ascertain if there are any operations excepting the most meager operation during 1951, because the text of the document indicates that, in fact, there were no scheduled operations, and I think that the Colonel will tell us, as a matter of fact, that since there were no unscheduled operations of any significance during that period that, from the reading of this document, it would appear that the loss appearing here (201) was not an operating loss but simply resulted from the continued existence of the company without operating. The materiality of this will become more apparent as we go along.

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Q. During the combined period of the company's operations from January, 1950, until the end of April, 1951, did not the company in fact suffer an operating loss of somewhere in the neighborhood of from four hundred to six hundred thousand dollars? A. I don't think that figure. I am not familiar with that figure.

Q. Well, now, you know that during 1951 the gross income of the company from all sources was not in excess of $1,700,000, is that right? A. In 19—

Q. 50. A. Yes.

(202) Q. According to the prospectus the gross income was $1,700,000? A. Yes.

Mr. Nickerson: No—where is it?

A. (Continuing) Yes, $1,717,000, yes.

Q. For the few months you operated during 1951-1950, the period which is reported upon, if the company had had an operating loss of nearly a third of its total income, namely, something from, say, five to six or seven hundred thousand dollars, you would know about it, wouldn't you? A. Of course I would.

Q. Tell me, did the company have, during this period, a loss of approximately one-third of its operating income? A. No.

Q. Colonel, you had purchased two airplanes, one from the Flying Tigers and one from Near East Airlines, is that correct? A. That is correct.

Q. The purchase price of these airplanes was approximately, for the both of them together, approximately $440,000, isn't that right?

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(205) Mr. Schoenwald: How much did he pay for the airplanes when he bought them in 1950? I think I suggested what the answer was.

The Witness: $440,000.

Q. When you carried these on your books you depreciated them during the course of the year that you had them on your books, did you? A. Yes.

Q. So, as a matter of fact, they were on the books of your company as of 1951, the date you sold them, at about $350,000 or $300,000, isn't that correct? A. I wouldn't know that. It would have to be in the books.

Q. Well, now, I show you this paper, Colonel. Will you tell us what it is? A. Yes, statement of AVE.

Q. That conforms, does it not, to the statements of AVE appearing in the books of the company at that time, does it not? A. Yes.

Mr. Schoenwald: Do you want to produce the original statement, Mr. Nickerson, balance sheet of (206) December, 1950?

Q. Is this the balance sheet of the company which you sent to Mr. Gotch so that this prospectus could be prepared, or which was sent to Mr. Gotch? A. Yes.

Mr. Schoenwald: I would like to have this paper marked in evidence.

Mr. Nickerson: No objection.

(Marked Plaintiff's Exhibit 372 in evidence.)

Q. You may look at this in the meantime. Will you note, please, that there is a depreciation reserve on the asset part of that balance sheet? A. Yes.

Q. So that all the assets on there, the principal one is the, are the fixed assets, the principal one is the airplanes, is it not, flight equipment? A. I wouldn't know what part was for what.

Q. Just looking at it you can see, can't you, that the flight equipment is $477,000 and no other item of the four other items is as large as a hundred thousand dollars; isn't that right? Do you see that? A. Yes.

Q. The $200,000 reserve for depreciation must, in a very substantial measure, apply to the airplanes? (207) A. Yes.

Q. So it is a fact that the airplanes were carried on your books at the time for an amount at between $300,000 and $350,000? A. That is what it says here.

Q. You sold the airplanes, didn't you?

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Q. You sold the airplanes, did you not, Colonel, in April, 1951, or May 1st of 1951, for a million dollars, did you not? A. Yes.

Q. So you made a non-operating profit during this period of $650,000, isn't that correct? A. Yes.

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(208) Q. I understand, then, that these airplanes were carried on the books at the time you sold them for about three hundred to three hundred fifty thousand dollars, is that right? A. Yes.

Q. And that you sold them, did you not, in around May 1st, April 30th for about a million dollars, is that right? A. Yes, that is right.

Q. And you had a profit represented by the difference in which you carried the planes and the amount you sold them for approximately $650,000, is that right? A. Yes.

Q. This was not an operating profit? A. No.

Q. Colonel, did you use this $650,000 of nonoperating profit to pay $650,000 of operating losses during this period? (209) A. No.

Q. What did you do with the $650,000? A. I paid capital debts and straightened out the finances of the company.

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Q. Colonel, did you have any non-operating losses between 1950 and 1951, any significant ones, more than $10,000, let us say? A. The books would show that. I am not an accountant. I am not familiar with those details.

(210) Q. In your capacity as president, while you were president of the company, did you have any other government employment? A. No.

Q. In the capacity as president of the company did any non-operating loss come to your attention in excess of $10,000 or even $50,000? A. I don't recall that, no.

Q. That is, during the period of 1950 and 1951. A. Yes. I don't recall.

Q. Can you tell then of where this $650,000 excepting to pay operating losses? A. I would have to go into my books

and see that, get an accountant to help and bring what explanation there is to it.

Mr. Schoenwald: I wonder if you could give a copy of that Exhibit 372 to the witness to have in front of him?

Q. I direct your attention to the accounts receivable of this company, as it appears on the balance sheet before you, and ask you whether or not that statement of $564,152 is approximately correct for the accounts receivable of the company at the end of December, 1950? (211) A. I would say it is, yes.

Q. Now, the bolivar is the currency of Venezuela, is it not? A. It is.

Q. That is a relatively stable currency, is it not? A. It is stable, yes.

Q. It was in 1951 and approximately is now 31 or 32—one dollar-wise equal to 31 or 32 cents of American currency; is that approximately correct? A. I think it is 3.35 bolivars per dollar.

Q. I show you a paper marked 42-B for identification and ask you to tell me what that paper is.

Mr. Schoenwald: Mr. Nickerson, perhaps you can produce the original of it, which I believe you have here.

A. I cannot read very well. I can't see this word here.

Mr. Nickerson: M-A-Y-O-R, I believe.

The Witness: Yes, it is a statement by this man named Jaime Esearva, I think it is, Munez.

Mr. Schoenwald: Do you have the original of that document here, Mr. Nickerson?

Mr. Nickerson: I don't. We will use your copy. I don't know whether I have or not.

(212) Q. That is from your books and records, is it not, Colonel Marcano? A. Yes.

Q. That was produced by your attorney at our request as being part of the books and records of your company, was it not? A. Yes.

Q. I direct your attention to the accounts receivable portion on that document and ask you to tell us how much that was in dollars? I suggest to you that the answer is approximately $492,913, is that correct? A. Yes, sir.

Q. And—

* * *

Q. As a matter of fact, that is only one account receivable at that time which is equal to approximately $492,000? There are other accounts receivable. There is an account there called Ministerious, is there not? A. This is not accounts receivable, but it says here on the third—before the last one?

Q. Yes. (213) A. Income from transportation. That is what it means.

Q. Isn't there an item called agencias? A. Agencia, yes.

Q. Isn't that approximately $492,913? A. 1,166,208 bolivars and 38 centimes—I don't know what represents in dollars.

Q. Roughly divided by the formula you gave us. A. I will have to do it each. I can't tell you.

Q. Would you accept our arithmetic? We have got it done. A. I would like to see it.

Q. (Indicating) A. Yes, it is.

Q. There are other accounts receivable there under the heading of Ministerious, is that right? I think the item is 27,049 bolivars? A. Yes.

Q. Would you accept, at the rate suggested, you suggested before, that this was about $8,074?

* * *

(214) A. Yes, I would say it is around that figure.

Q. The total: Would you say that the total of accounts receivable, including the large item from agencias, had grown between December 31, 1950, and the date of that document, which I believe is April—is that right? A. August, August 16, 1951.

Q. But it speaks, does it not, of the condition of the company as of April, 1951? A. Yes, it speaks of the company as of April, 1951.

Q. Colonel, apparently as of June, 1951, it would appear that the company should have assets from the sale of its airplanes at $650,000 and accounts receivable in excess of $500,000, well over a million dollars. In your prospectus, I think—

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(215) A. These were moneys in Spain. They weren't at our disposal.

Q. You mean that $261,000 was in Spain, is that right? A. Yes.

Q. And that $261,000 is a part of the total of assets, is it not, which appears here? A. Yes.

Q. So that there is nothing here to indicate, including the money you had in Spain, roughly $250,000, that you had a million— A. That 261,000.

Q. Thank you, $261,000. (Continuing) That you had $1,100,000.

Mr. Nickerson: Your Honor, I am going to object to this. This speaks for itself. Whatever is in the books speaks for itself, and whatever statement speaks for itself.

(216) The Court: I think you cannot go any further than showing what the facts were. Please reserve your argument for later.

Q. Colonel, would you tell me what happened to the $650,000 that you earned from the non-operating income on the sale of the planes and the $500,000 that you had in May in accounts receivable by June 15th? Where did this money disappear by the time this statement dated June 15th was prepared? A. We will have to go into the books to look for them.

Q. Do you know where this million dollars went? A. I do not at this time.

The Court: Haven't you already testified, Colonel, that you used a part of a profit from the sale of the airplanes to pay numerous capital debts, or did I understand you correctly?

The Witness: Yes.

Mr. Nickerson: Yes, he testified to that.

The Witness: A part of it, but he asked me all the money. I don't know where it went.

The Court: At least part of it went for the purpose of paying various capital debts, is that right?

(217) The Witness: That is right, sir.

Q. Will you tell us what the capital debts were that it went to pay? A. Again I would have to refer to my books because I don't have—

Q. I show you your profit and loss statement as of—your balance sheet as of December 31, 1950, and you have before you a statement of your various accounts as of April, 1951. Can you show us there that there were capital debts of $1,100,000?

Mr. Nickerson: Your Honor, I am going to object to that. Whatever appears on the statement speaks for itself.

Q. Does that refresh your recollection as to what happened to this $1,100,000? A. No, it doesn't. Lots of details, which I cannot recall them, in these figures. I just have a bare knowledge of the company but I never went into the details of my bookkeeping department.

Q. Does it refresh your recollection for me to suggest that the accounts receivable, presumably the earnings during 1950 or 1951, depending upon whether you operated in 1950 or 1951, were never collected—were never earned and were written off and that $500,000 (218) or $600,000 of your earnings in effect never took place? A. The books would speak for that.

Q. Did you write off any accounts receivable? A. Yes, I did.

Q. Did you write off $500,000 of accounts receivable? A. I don't know how much it was.

Q. How many hundreds and thousands of dollars of accounts receivable did you write off? A. I wouldn't know.

Q. But it was several hundred thousand dollars of accounts receivable that you wrote off, isn't that right? A. $700,000?

Q. That is right. A. I wouldn't know.

Q. I wonder, Colonel, if you can, and this really does confuse me, how in your capacity as president of the company, with no other employment, you wouldn't know whether or not several hundred thousand dollars of the company were written off. Is there any—were you ill during this time? A. Are you referring to this statement of estimated assets and liabilities of June 15, 1951?

(219) Q. I think that is one of the factors of my question. However, what I am asking you is whether or not you have any knowledge as to whether or not the earnings reported during 1950, consisting of; apparently, the accounts receivable from agencias in excess of $500,000, disappeared or were written off or subsequently were deter-

mined by you to be no assets at all, or never earned or never collected? A. May I have that question again, please?

(Question read.)

A. In the preparation of this statement here, which I have in front of me, or the study, on page 6, when I ordered this to be made, I instructed Mr. Morgan, in order to show what was the actual cash value of the company, to write off all accounts receivable, to indicate all depreciation, in other words, to show real value, cash value of the company, and that is what I had in mind when this statement was written.

Q. Now then, you had instructed Mr. Morgan to write off assets of, approximately, four to five to six hundred thousand dollars, isn't that right? A. I wouldn't remember what the amount was.

Q. It was several hundred thousand dollars, wasn't it? (220) A. I don't know. I would have to look in my books and find out.

Q. Would you produce the books that would help you to find out? Do you have them here? A. We had them here. I don't know if we have them here. I sent all my records to you up here.

Q. What did you do? What happened to them then? A. I sent them back to Venezuela.

Q. You don't have them with you now? A. I don't have them with me now.

Q. So you are unable to answer these questions?

Mr. Nickerson: We have some books. We don't have all. We got 750 pounds of records from Mr. Schoenwald and they have all been made available.

Q. Will you, during recess, see what you can find out

about what happened to this four or five hundred thousand dollars? A. I sure will try.

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(221) Q. The earnings that you show here on page— I direct your attention to page 2 of the prospectus, showing net operating income for 1950 of $58,000, and the same figure repeated on page 5. That net operating figure, net operating income figure, was calculated, was it not, before you instructed Mr. Morgan, as you tell us, to write off these assets as not collectible or not valuable?

Mr. Nickerson: I object to that. That shows on the statement of 1950. He has already testified that this instruction was after, namely, when they were making up the estimated cash value of it as of June, 1951.

The Court: I so recollect his testimony Mr. Schoenwald.

Mr. Schoenwald: Your Honor, what I would like to demonstrate is that this profit of $58,000 was, in fact, not a profit but a loss of half a million dollars because the $1,717,000 for the gross income of the period included accounts receivable recognized before the publication and distribution of this prospectus as being either without value or uncollected or non-existent. So that at the time this prospectus was prepared, the defendants knew that the figure $58,000 (222) was not a correct figure, but, in fact, that the correct figure was a minus of $500,000, and I am asking the Colonel to tell me whether or not the accounts receivable reflected in the profit and loss statement of 1950 and of April, 1951, include the sums which appear in this gross figure of

$1,717,000 so that we will know that the $58,000 figure is not an accurate reflection of the condition of the company or the experience of the company during 1950.

Mr. Nickerson: Your Honor, that just isn't so.

The Court: You see, I have been trying very hard to get both of you gentlemen to refrain from arguing your case out of order, and we are not going to make any progress unless you reconcile yourselves to establishing essential facts while the witnesses are on the stand and then reserving your arguments for the appropriate time in the case. I think you are both straining to inject argument into matters prematurely, and I sustain the objection on that ground.

Q. Colonel, these assets from agencias and otherwise of $500,000 were largely earned during 1950.

Mr. Nickerson: Which assets?

Mr. Schoenwald: The $500,000 that the (223) Colonel testified from the two exhibits before him were listed as accounts receivable and particularly the large account of agencias. As a matter of fact, I think we have neglected so far to have this paper marked in evidence. I wonder if we could do that? May we have this marked in evidence?

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(Marked Plaintiff's Exhibit 42-B in evidence.)

Q. The five hundred, approximately, thousand dollars, slightly smaller in 1950 and slightly larger at the end of April, 1951, is included, is it not, in this figure of $1,700,000? A. It says here during the calendar year 1950 AVE grossed $1,717,332 in operating revenue.

Q. When you say "operating revenue" do you mean that your books were operating on a cash basis? Is that what you are trying to suggest to me? A. No.

Q. Then, accordingly, you treated as operating revenue the accounts receivable from agencias, did you (224) not? A. Yes.

Q. That is not the accounts receivable from agencias of $500,000 included in that $1,717,000?

Mr. Nickerson: No—your Honor, I object to that. Excuse me.

The Court: Sustained. Rephrase your question.

Q. Colonel, can you tell us whether or not the $1,717,000 referred to on page 5 and elsewhere in the prospectus was calculated after the inclusion of the items which we have referred to on the exhibits now before you of approximately $500,000 for accounts receivable?

Mr. Nickerson: Your Honor, I object to that.

Mr. Schoenwald: I wonder if you would state the ground for your objection.

The Court: On what ground?

Mr. Nickerson: On the ground that this speaks for whatever it is April, 1951. Some of these may have been paid off. Some of them may have been realized.

The Court: The statement that the witness (225) has just read specifically says during the calendar year 1950.

Mr. Nickerson: Yes.

The Court: Not 1951. AVE gross $1,717,000, approximately. The question is how this figure was calculated, and the witness should be prepared to state that if he knows.

Mr. Nickerson: That is all right, but he was including in it accounts receivable of 1951.

The Court: All right, you will rephrase the question, please.

Consider the question rephrased to be this: How was the figure appearing in the first line of page 5 of the exhibit—what is this, Exhibit B?

Mr. Nickerson: 357.

The Court: (Continuing) Plaintiff's Exhibit 357, which we have referred to as a prospectus, figure of $1,717,332 calculated?

The Witness: On the income of the operations.

The Court: And did that include the moneys received from the sale of capital assets including these two airplanes?

The Witness: No, sir.

Q. The other question which I had in mind: Did (226) it include the $500,000 from agencias which we have as yet—we haven't been able to ascertain the disposition of? A. Which appears where?

Q. Which appeared on the December 31st balance sheet of the company under current assets, traffic accounts receivable $446,000.

The Court: That is December 31st of what year?

Mr. Schoenwald: 1950, which is the year adverted to, if your Honor please, in the prospectus.

A. Yes, I would say it is.

Q. Then, Colonel, can you tell us when you determined that the assets of the company, including that $446,000, should be written down and when you instructed Mr. Morgan to write that down to its true value, did you make any effort to correct the figure of $58,000 as a profit for that period?

Mr. Nickerson: I object.

The Court: Sustain the objection. It is argumentative.

Mr. Schoenwald: I think, if your Honor please, the witness did testify that he had instructed—

The Court: Don't review the witness' (227) testitimony and argue with me. You are asking him whether he made an effort to reduce it or whether he made an effort to change it. Your whole question implies he was under some duty to change something. You are getting an argument phase of the case.

Q. Did you instruct Mr. Morgan to write down the profits for 1950? A. No.

Q. Did you know that the reduction of the accounts receivable and the reduction of the gross income during 1950 would affect the income during that period as reported in the prospectus?

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A. This reduction of receivables you are taking for granted that they were these figures that appear here, and they weren't.

Q. You mean to say you didn't reduce the accounts receivable, is that right? A. Not that receivable from agencias.

Q. At no time did you reduce the accounts from agencias? (228) A. Not accounts receivable, no.

Q. What accounts receivable did you reduce? A. Old CAVE's accounts receivable.

Q. Were there any accounts receivable from agencias that were old? A. I wouldn't know that. I wouldn't remember that.

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The Court: Colonel Marcano, didn't you testify a short time ago that that $261,860 figure appear-

ing on page 6 of the so-called prospectus, Exhibit 357, represented moneys you couldn't get out of Spain?

The Witness: Yes, sir, your Honor.

Q. Colonel, the figure reported on page 2, the $58,000 profit figure—on page 5 there is a reserve, is there not, Colonel? A. Yes.

Q. For exchange loss of $126,000? A. Yes.

Q. That is a reserve because of the devaluation of the peseta, is that not right? A. That is reserve because the peseta changed, (229) it continually changed, it still changes its rate, and, instead of leaving that to contingency, we thought it would be a good idea, to make some real value on those pesetas, to have a provision for any loss that might happen at the time we were going to exchange.

Q. So this reflects not only the difficulty of getting the pesetas out of Spain but it also reflects the fact the pesetas were not worth what you thought they were worth? A. What it says there, it says is a reserve, a provision for depreciation, in case of change.

Q. But the pesetas that it refers to, the quarter of a million dollars, were earned in 1950? A. That is right, they were earned in 1950.

Q. When you calculated your tax during 1950 to find out that your profit was $58,000, you didn't take the reserve, did you?

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The Court: Answer it yes or no, do you know?

The Witness: No, I don't know it.

(230) Q. Will you show us, Colonel, the franchise of the company during the period that the contract with

USOA was being negotiated? In other words, the franchise as it existed during July of 1951.

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(233) Q. Is this paper, Defendant's Exhibit BJ, a copy of a franchise you held or the franchise you held from the Government of Venezuela at July, 1951?

Mr. Nickerson: I object to that. All these documents speak for themselves, and to get him to characterize it I don't think is fair.

The Court: I think it is proper to ask this witness, in view of his connection with the business, whether or not he can state that Defendant's BJ contains (234) within its four corners all the franchise rights of this company as of that date?

The Witness: Yes, it does. This one I am talking of, this paper.

Q. The paper you have in your hand now? A. The whole thing. I would have to go through it.

The Court: What is the number in the upper corner there? BJ for identification.

The Witness: I would have to go through it.

The Court: Is that your best recollection as of right now?

The Witness: Yes, sir.

The Court: Don't take the time to read it now, please. I will give you the opportunity to examine it more carefully later, and if you wish to amend your answer, I will give you the right to do so.

The Witness: Yes.

Mr. Schoenwald: I would like to offer this in evidence.

The Court: Is there any objection?

Mr. Nickerson: I have no objection.

(Marked Defendant's Exhibit BJ in evidence.)

Mr. Schoenwald: May I direct your attention (235) to the salient paragraphs there?

The Court: No, not now.

Q. Are you familiar with the expiration date of this document? A. I think it is in August, 1951.

Q. Will you look at it and see if you can tell us?

Mr. Nickerson: Your Honor, doesn't that speak for itself?

A. It speaks for itself. It's for one year more. It's dated August 8, 1950. it is.

Q. Is this the franchise you reported to Gotch and Crawford when the prospectus was prepared? A. Yes.

Q. I direct your attention to paragraph 13 of this document and ask you to look at it. A. Yes, I have read it.

Q. Did you have at the time this contract was prepared any amendment to that paragraph? A. No.

* * *

(236) The Court: I intend to be guided by Exhibit N, which is in the record—

(237) Mr. Schoenwald: There is no substantial difference.

The Court: (Continuing)—as the agreement between the parties since that is the original contract between the parties.

* * *

Q. Can you or your counsel produce for me today any amendment subsequent to the execution of the contract, properly certified by your government, and in other respects competent to be introduced before this court, showing that paragraph 13 of the franchise has been amended?

Mr. Nickerson: No, we have nothing.

(238) By the Court:

Q. Colonel, you have heard Mr. Cox testify yesterday that at one point a number of gentlemen and yourself went down to Venezuela in a DC-3; do you recall that? A. Yes.

Q. Was that before or after you had entered into the contract? A. That was after we entered into the contract.

Q. At that point was there a meeting between Mr. Cox and these other gentlemen and Mr. Morgan, whose alleged signature appears on the profit and loss statement here, your accountant, as treasurer? A. Yes.

Q. Was there a meeting between them? A. Yes, your Honor.

Q. Did that meeting take place at the offices of the company in Caracas? A. Yes, sir.

(239) Q. Do you know in substance what went on at that meeting, was there any exploration of the books or figures of the company? A. No, your Honor. When they went there, I told Mr. Morgan, as I told all the personnel in the office, that USOA was a company we were doing business with and I would appreciate they open their books and them all information they wanted of the company. I said that to Mr. Morgan, Mr. Zamballa, who was my traffic manager, Mr. Navarro, who was another traffic manager.

Q. When you gave these instructions do you know whether in point of fact they were actually carried out? A. I don't know. They were required to carry them out, sir.

Q. You heard no—I withdraw that.

During that visit to Caracas by Mr. Cox and his associates did they at any point ever complain to you that information which they were seeking was not available to them? A. No, sir.

Q. Where is Mr. Morgan now? A. Mr. Morgan, the last I heard from him, he was in England. I tried to get him from Price, (240) Waterhouse, for whom he worked, but I haven't been able to do so.

Q. Did he cease to have any connection with you or your company? A. Yes, sir, after, after 1952. He left the company and went abroad, to Europe—to England, specifically.

Q. Now, Colonel, in Spain your company operated through an agency, did it not? A. Yes.

Q. What was the name of that agency? A. Fletemar, S. G.

Q. What were the duties of the agents?

Mr. Nickerson: Could you fix the date?

Q. Was this true during all the time your company operated in Spain? A. All the time the company operated in Spain.

Q. What were the duties of the agents in Spain? A. To procure passengers and traffic generally.

Q. Did they take care of all the affairs of the company in Spain? A. I beg your pardon? I didn't hear your question.

Q. Did they take care of all the affairs of the (241) company in Spain? A. Not all the affairs.

Q. What other representatives did you have in Spain to take care of their, the company's affairs in Spain? A. Whenever there was something to do in Spain either Mr. Salezar or myself would go over, and if it was a policy matter.

Q. And during the period you operated from January, 1950, to April, 1951, how many times did you or—how many times did you and Mr. Salezar go to Spain? A. I went about three or four times, Mr. Salezar, I think, went about the same number, and Mr. De Castro, who was another official of the company—

Q. Could you give—

Mr. Nickerson: May we have the answer completed? He didn't let him answer.

The Court: Finish.

A. (Continuing) Mr. De Castro, who was another official of the company, also went three or four times. I wouldn't be sure of the number of times he went but it was around that figure.

Q. Could you give us the approximate amount of time that people, other than Fletemar, were in Spain (242) in behalf of the company cumulatively? Was it more than three or four weeks altogether? A. Much more than that.

Q. About how much? A. Each time I went I would stay more or less a week, 10 or 15 days. I went about four times. So my time would be more than four weeks.

Q. Did Fletemar procure supplies for you in Spain? A. Yes, office supplies and so forth.

Q. Did they report to you on conditions affecting traffic in Spain? A. Yes, they did.

Q. As a matter of fact, did they from time to time have communications with the consul or embassy dealing with problems of procuring passengers in Spain? A. I would like to have that again.

Q. Didn't Fletemar from time to time have conversations with the Venezuelan Consulate or Embassy in Spain dealing with problems relating to the procurement of passengers? A. They may have, yes.

Q. As a matter of fact, didn't you receive a letter from the Venezuelan Embassy or Consulate, (243) addressed to you personally—didn't you receive a letter addressed to you from the Venezuelan Consulate or Embassy telling you about the many discussions that Fletemar had with them about traffic problems? A. Yes. I don't recall exactly the letter.

Q. But you know that you received communications of that sort? A. Yes.

Q. And you know that Fletemar was in active contact with the Embassy and the Consulate in connection with traffic problems in Spain? A. I wouldn't put it that way.

Q. How would you put it? A. I would put it that Fletemar, being the agent of the Venezuelan company, if they had any problems, traffic or otherwise, would go to the Venezuelan Embassy and explain it to them.

Q. Then they would report to your about those things? A. Would report to me about those things.

Q. And this is the way you would get your information so you could carry on your duties as president of the company, is that right? A. I would get whatever information was sent to me.

(244) Q. And you would use these in your duties as president, wouldn't you? A. I don't understand that question.

Q. I am sorry. A. I don't understand the question.

Q. Well, when you got information from these agents, this was a basis on which you were able to carry out your duties? A. I would digest and apply whatever judgment I had to to them, yes, sir.

Q. I show you paper marked Plaintiff's Exhibit 162 for

identification and ask you whether you can identify that letter for us? I am not asking you yet— A. Yes.

Q. (Continuing) What is that letter. A. That is a letter from Fletemar, my agents in—

Q. In Spain? A. In Spain.

Q. It was a letter which you received in the regular course of your duties as president of the company, was it not? A. Yes, it was.

Mr. Schoenwald: I would like to ask that (245) this letter be marked in evidence, and I would like to call to your Honor's attention that there is a stipulation between counsel with respect to the annexation of translations of all or parts of a letter to each letter, and I believe that a fair statement of the stipulation is that while counsel at all times, my adversary, has an opportunity to correct the translation, to add to it or to indicate its incorrectness in any fashion, that until he does so, we will presume that the translation attached to the document is an accurate translation of all or part of the letter, and that with respect to those parts of the letter which are readily translated into English, for example, dates, or address, or signature, there is no need to translate such items.

The Court: Yes. Is that substantially correct?

Mr. Nickerson: Yes. It is in our pre-trial order.

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Mr. Schoenwald: I offer this letter in evidence.

• • • •

(246) (Marked Plaintiff's Exhibit 162 in evidence.)

• • •

(247) Q. Colonel, you recall, do you not, that in the prospectus that statistics for passengers that you had experienced in the past in Spain ran several hundred a month? And in order to refresh your recollection I think that you might want to look at a copy of the prospectus. Do you have one there? A. I don't have one.

Q. It is your recollection, with or without the prospectus (handing), is it not, that in your 1950-1951 operation that there were several hundred passengers a month out of Spain; isn't that right? A. Yes, that is right.

• • •

Q. It was on the basis of this that these statistics were compiled showing the number of passengers each month and the mile revenues—and the revenue (248) miles flown, is it not? A. Yes, there are—

The Court: On the basis of what?

Mr. Schoenwald: Several hundred passengers from Spain a month.

Mr. Nickerson: Exhibit 3, number of passengers, not the prospectus.

The Court: I am not certain yet. Exhibit 3 shows the—

Mr. Schoenwald: Representations as to the number of passengers.

The Court: Exhibit 3 of Plaintiff's Exhibit 357 shows what the defendants believe to be the number of passengers carried.

Mr. Schoenwald: Well, what they represented to be the number of passengers carried.

Mr. Nickerson: Yes, your Honor, and it is shown eastbound, westbound, and total. It is the third group from the bottom of that page.

The Court: We have established that. Put another question, please.

Q. When you received Exhibit 162 in evidence you were advised, were you not, that the total quota from Spain passengers to Venezuela, emigrating to (249) Venezuela, for all media of communication, including Iberia and the various shipping companies who took people by ocean from Spain to Venezuela was not in excess of fifty to a hundred per month, and that the most passengers that your agent expected to be able to produce was 40 to 50 per month? By that time you knew, did you not, that the passenger statistics described in the prospectus of June 15th were no longer reliable estimates of what you could anticipate in the future?

Mr. Nickerson: I object to it as characterizing that document. It speaks for itself.

The Court: Sustained.

Mr. Schoenwald: Which document are you referring to?

Mr. Nickerson: Plaintiff's Exhibit 162.

Q. By the time you received this letter, April 10th, you knew that your past experience for 1950, as described in this paper, was no longer an accurate estimate of what could be expected in the future, is that right? A. I would say that the number of passengers wasn't changed at all. Spain has no quota on passengers. It can produce as many passengers that any airline can be able to assimilate, to travel with (250) them.

Q. You told us, I think, that Exhibit 162 was a communication which you received from the agents in Spain who, when you weren't present, at least, conducted traffic procurement for passenger affairs in connection with the Venezuelan Consulate and Embassy? A. Yes.

Q. And if I am correct, this paper indicates that they advised you that the total number of passengers which

you could expect to receive in the future, that is, April 10th, shortly before you sold the airplanes, was reduced to not more than 40 or 50 a month?

Mr. Nickerson: I object to it as characterizing the document.

The Court: Yes, sustained. The document is in evidence. It speaks for itself.

Q. Is it your contention that the contents of this letter are not an accurate description of—

Mr. Nickerson: I object.

The Court: He is not here to contend anything.

Q. Can you explain to me why you have previously testified that there was reason to expect more passengers from Spain than mentioned in this letter?

(251) Mr. Nickerson: I object to it, your Honor.

The Court: I sustain the objection. It is argumentative and I think you should rephrase your question, as to whether on or about the date of the receipt of that letter his expectations differed from—

Mr. Schoenwald: Thank you.

The Court (continuing): —the traffic forecast in that letter.

Q. Would you answer the question suggested by the Judge? A. Didn't.

Q. Did you have any anticipation of passengers other than that which is described in this letter at that time? A. Yes.

Q. What was that? A. Regular carrying passengers, because they refer here to Spanish immigrants and there are a lot more (252) sources of traffic than immigrants.

Q. I direct your attention to that part of the letter which states, "It seems to us, however, that in these circumstances we must consider"— A. Just a moment.

* * *

A. Yes?

Q. "It seems to us, however, that in these circumstances we must consider that it will be very difficult to secure more than 40 to 50 passengers per month as a maximum."

Now, can you tell us whether or not you had at that time any reason to anticipate that you would have more passengers than 40 to 50 per month from Spain? A. They say here, "It will be very difficult." They didn't say they couldn't have more than 40 or 50 passengers.

Q. Did you have any sources of information which (253) gave you a contrary opinion than the one contained in the letter from your agents? A. Yes, I received and continually received letters of this kind in which my opinion was that the agents were trying to cover up any decrease of number of passengers, but to my experience that was never the point. They were always trying to get more seats than I had to give them.

Q. Do you have any of those letters with you here today from your agents that show that on or about April 10th there was reason to believe that there would be more passengers than 40 to 50 per month out of Spain?

Mr. Nickerson: That is not what he testified your Honor.

The Court: Do you have any of those letters?

The Witness: I don't have them, your Honor.

Q. I direct your attention to the prospectus on page 2, the fourth numbered paragraph, which continues over to page 3, and ask you whether, Colonel, it was a fact that the largest proportion of the passengers which you carried

on your airline during 1950-1951; and which you expected to carry in the future, and about which you told Mr. Cox, were immigrants? (254) A. We had a sizable amount of immigrant traffic.

Q. Was it not the fact that by and large the greatest number of people, that is, half or more than half, were immigrants? A. I would have to look into my records to ascertain that.

Q. You have been asked that question before on the deposition, have you not? A. I may have; yes.

Q. Do you have any records here which will help you to answer that question? A. I don't know if I have any record right here.

Q. Is there anything you can do to tell us whether or not you can clarify this question as to whether or not most of the passengers carried on your airline were immigrants? A. I say that I have a recollection—I know we had a sizable amount of immigrant traffic. We had quite a lot of immigrant traffic.

Q. Was it more than half? A. I am not prepared to say if it was more or less than half.

Q. You have done nothing since we asked you that question in the past to find out whether it is (255) more than half? A. I will do my best to find out.

Q. Did you advise Mr. Cox or any—or Mr. Marshall, or Gotch and Crawford that the immigrant quota out of Spain had been substantially reduced? A. No, I don't think I did.

Q. Did you advise him that the agent in Spain had told you that in the future you couldn't expect more than 40 to 50 passengers per month? A. He didn't say that to me.

Q. Had you told him anything related to the contents of that sentence which I previously related, that the agent apparently said it would be very difficult to secure more than 40 to 50 passengers per month as a maximum? Did you tell that to Mr. Cox? A. I didn't tell it, no.

Q. Did you tell it to Mr. Marshall? A. No.

Q. Or Gotch and Crawford? A. No.

Q. But you knew about it some time around April 10th, isn't that correct, when you received this letter?

Mr. Nickerson: I object to that. The (256) letter doesn't say any such thing.

The Court: You knew whatever the letter contained when you received it?

The Witness: In a general way, yes, I knew.

Q. You received it shortly after this date, isn't that correct? A. As a matter of fact, I don't know if I was in Caracas on April 10th. I may have been in New York and that letter may not have gone through my hands. It went, I knew about it.

Q. You previously testified you had received it, had you not? A. Well, when I said, I meant my office received it.

Mr. Schoenwald: I would like to call upon counsel to help me to restate to the Court a stipulation that we entered into during the pre-trial proceeding, namely that each of these letters that was marked would be deemed to have been sent and received shortly after the date appearing upon the letter, and that it was sent by the apparent sender and received by the apparent addressee, including copy of the addressee's. Is that correct, substantially correct, Mr. Nickerson?

Mr. Nickerson: I will get the pre-trial (257) order for your Honor. A certain number of documents, your Honor, in paragraph 3-B of the pre-trial order. It states, where documents consist of copies or originals of correspondence, communications, cables or other memoranda, the original was signed by the

purported sender and received by the purported recipient.

The Court: Yes, I see that section of the pre-trial order.

Q. Can you tell us who Mr. Savino was?

Mr. Nickerson: I object to that, your Honor, until he shows how he is connected.

The Court: He has got to start somewhere.

Mr. Nickerson: All right.

Q. Can you tell us who Mr. Savino was? A. Yes, he was the immigration attache to the ministry in Rome.

The Court: To the Venezuelan Embassy?

The Witness: To the Venezuelan Embassy in Rome.

Q. In which country was he attache to the Venezuelan Embassy?

The Court: He said in Rome.

Q. You have met Mr. Savino, have you not? A. I have met him, yes.

(258) Q. You knew what his functions were, did you not? A. I did.

Q. Is this a fair statement of his functions, that he was charged with the issuing of visas and processing other documents necessary for the passage of immigrants from Italy to Venezuela? A. No, I don't think so.

Q. Was he the Agregado Emigracion? A. He was.

Q. Was he in charge of the office that dealt with bringing immigrants from Italy to Venezuela? A. He was.

Q. As a matter of fact, did you not receive several communications from your representaives in Italy pointing out to you the importance of the role of Mr. Savino in assuring the even flow of passengers from Italy to Venezuela?

Mr. Nickerson: Can we fix the time?

Q. Did you not reecive such letters approximately monthly during the last six months of your operations of this company? A. Yes.

The Court: You are referring now to the last six months of what year?

(259) Mr. Schoenwald: The last three months, let us say, of 1950, and I guess the last two months of 1950, the January, February, March and April of 1951.

The Court: All right.

Q. And were you not advised that it was anticipated that Mr. Savino would leave Italy and that this would have a dramatic or significant effect upon the passenger production in the future? A. The importance of this, what you are talking about, Mr. Schoenwald, is that Mr. Savino was the immigration attache. To us it was important, not Mr. Savino, but the office of the immigration attache, whoever was in that office.

Q. I am going to let the answer stand, but you were advised that the office was about to be vacated? A. Vacated, not closed.

Q. You were advised Mr. Savino would depart and that until a replacement came that the office would not function? A. It will function, sure, it will function.

Q. Did you receive communications telling you that when he left it wouldn't function? A. It would continue

functioning under the—any directive of the Government of Venezuela. I wasn't (260) in a position to know, nor anybody in Rome.

Q. I am asking you whether you received reports from your representatives in Spain, including Mr. Tommassini? A. In Spain?

Q. I am sorry, in Italy, and Mr. Cover? Mr. Tommassini, whom I think was your legal representative, Mr. Cover, who was your general manager over in Italy, or in all of Europe, and Mr. Guidoitti, to the effect that it was expected that Mr. Savino would leave, as a matter of fact, on December 22, 1950, and that until such time as a replacement was appointed they didn't expect or anticipate an even flow or the issuance of the papers necessary for emigrants to go from Venezuela to—from Italy to Venezuela. A. I was advised that Mr. Savino would leave some time, I don't remember what date, and while there wasn't another immigration official, officer—official attached to the Embassy, those emigrants wouldn't be processed.

Q. I show you, now, letter dated December 22, 1950, and marked Exhibit 120 for identification, and ask you to identify that letter. A. Yes. It is a long letter.

(261) Q. I am sorry, I didn't hear you. A. Yes, I identified it.

Q. What is that letter? A. You want me to read it all?

Q. No.

The Court: Identify it, if you can.

Q. Who did it come from? A. Came from Mr. Cover.

Q. Who is Mr. Cover? A. Mr. Cover, in charge of the Rome office in Italy.

Q. This was a letter which you received from him? A. Yes.

Mr. Schoenwald: I would like to have this marked as an exhibit.

Mr. Nickerson: I don't see it has any relevance at all.

The Court: Let me see it. You object to it on the ground of irrelevancy? We are going to suffocate by paper if this goes on. This is a closely typewritten paper of two pages referring to various matters not germane to your examination.

Mr. Schoenwald: I would like to offer that part of the letter which deals with Mr. Savino and (262) his relationship to the procurement of passengers for this company?

Mr. Nickerson: I object to that, your Honor, on the ground that it has no relevance at all, back in December, 1950.

Mr. Schoenwald: If your Honor pleases, this is a document which I consider of considerable importance to one of the main questions of this case. Plaintiff has a heavy burden, as you indicated, in proving fraud. The means by which we hope to prove the fraud is by reconstructing true facts and comparing them to the prospectus. The only way we can do so is by picking up a certain degree of minutia from the files of the defendant. One of the facts we hope to demonstrate to this Court is the presentation in the prospectus as to its past experience and the prediction as to what may be anticipated in the future, which were matters as to which the defendant had affirmative knowledge weren't true in so far as they purport to describe the future based upon past experience.

The Court: I will not permit you to inject into this record a great deal of paper for the purpose of proving what I consider to be extraneous, cumu-

lative and irrelevant matters. Just to pick up this very (263) exhibit, the only part of it that could possibly have any relationship to what Mr. Marcano is testifying to is the statement in this letter that Mr. Savino has been called back to Caracas to take a job in the Ministry of Agriculture and that in the meantime his office will not grant any further papers —I suppose it means passports—until such time as his replacement arrives.

Mr. Marcano has already said that he so understood that this office was being vacated, that the functions of the office were not being terminated, and that they would be resumed when the replacement arrived. You are putting this in evidence as a letter from somebody in Rome. It merely increases the weight of the paper but doesn't increase the weight of the proof and I, therefore, sustain the objection on the ground that it adds nothing to what is already in the record.

(264) Q. Did you notice a diminution in passengers following the departure of Mr. Savino in December of 1950? A. That I wouldn't know, Mr. Schoenwald. I would have to look at the records and manifests.

Q. You were asked this question before on the depositions. Have you made any effort to find out?

Mr. Nickerson: I object to all this as being irrelevant, back in December, 1950.

The Court: Yes, sustained.

Q. Did you ascertain when, if ever, a replacement (265) was appointed? As a matter of fact, can you tell us whether or not there was a replacement, so that immigrant traffic could follow, in July, the date of the contract, 1951? A. I do not know if in July he was appointed.

Q. Accordingly, you don't know whether or not in July, 1951, whether or not there was someone there who could function to issue visas to immigrants? A. I do not know.

Q. Did you tell Gotch and Crawford, or Mr. Marshall, or U. S. Overseas Airlines, that the immigration attache who had left in December—22nd—1950, to the best of your knowledge had not been replaced or you didn't know whether this functionary was replaced? A. No.

Mr. Schoenwald: If your Honor pleases, I would like to briefly make an offer of proof with respect to correspondence with Mr. Savino, and I will try not to burden the record with much detail.

If your Honor pleases, we have in our records a number of items of correspondence from agents of the company, either the principal residing agent—various principal residing agents in Italy, who advised the defendant corporation by letters addressed to the (266) president of the company, which letters are the subject of the stipulation previously adverted to this afternoon, as to their sending and receipt within a reasonable time, which letters tend to describe the importance of Mr. Savino together with the effects of the absence of Mr. Savino on the possibilities of obtaining passengers in the future from Italy to Venezuela.

Mr. Nickerson: May we have those marked for identification? Your Honor ruled them out. They are all prior to December, 1950.

Mr. Schoenwald: I would be glad to have them marked but I didn't want to interrupt the passage of the trial.

Mr. Nickerson: They are already, I believe, marked, pre-marked.

Mr. Schoenwald: There must be several. Why don't you furnish the numbers at the proper time?

The Court: Offer them together and I will rule on them. As I understand, they are all dated prior to December, 1950?

Mr. Schoenwald: No. Some of them are dated after Mr. Savino left and are reports as to the difficulties that have now arisen.

The Court: What is the date span, (267) approximately?

Mr. Schoenwald: The date span is up until May of 1951, I believe. I have letters which deal with that; and two deal with other topics—I will refrain from introducing them.

* * *

(268) Q. Colonel, didn't you receive advice from Europe around April 4, 1951, that the prospects of obtaining passengers in the immediate future were poor? A. I don't remember specifically on that date.

Q. Didn't you receive a communication about that time indicating that the anticipation for future passengers was a poor one? A. I don't recall, Mr. Schoenwald.

Q. You don't remember receiving such a communication? A. I don't remember receiving on that date.

Q. In that period, approximately in April or May—July, did you receive a report in July of that character? A. I tell you I cannot remember any dates.

(269) Q. In 1951, now, before the contract was signed, which was around July 25th, some time in the last two or three months in that period, didn't you receive a communication telling you that there was then very little hope of getting passengers? A. During all the operation of AVE, I continually received communications from, specially from the agents in—Mr. Cover, sometimes Fletemar, that the traffic was falling down but I could never see that falling down reflected in the actual flow of passengers.

Q. Would you say that these agents were, then, unreliable sources in information? A. I wouldn't say they were unreliable. I would say that they were very conservative in their figures and they always wanted to be sure they would never say a figure that they wouldn't reach.

Q. Isn't it a fact, Colonel, that during the period, let us say the month of April, immediately before you sold the airplanes, that the number of passengers fell down significantly? A. I don't remember the fact.

Q. Well, I am not sure that I understand the statement that you don't remember the fact. Isn't it your recollection that immediately before you sold (270) the airplanes there was a noticeable diminution in the number of passengers you had? A. Very possibly so, and I think it is stated in the study, or Exhibit 357, that that was the situation at that time, that due to the unreliability of the schedule and so forth that operations suffered badly. So I would say—

Q. Would you show where in the study it indicates that in 1951 that passengers were falling off? Of course, I am talking about scheduled operations or unscheduled operations.

While you are looking, Colonel, I would like to suggest to you that you will find that study says you didn't operate in 1951.

The Court: Are you referring to your Exhibit 357, so-called prospectus?

Mr. Schoenwald: Yes, the study, the document—

The Court: No.

Mr. Schoenwald: I think that we had testimony from the Colonel earlier this morning—

The Court: Page 5 says operations were continued during 1951 on the charter basis until the

spring (271) when it was determined to sell the operating property, the equipment.

Mr. Schoenwald: There is no indication there that passengers fell off; on the contrary, the prospectus states elsewhere that, as a matter of fact, there weren't any scheduled operations at all during this period.

The Court: No, but I am simply picking up the statement you just made that operations had ceased. They hadn't. And the alleged prospectus says they continued during 1951 on a charter basis until the spring, and the two DC-4s were sold in May, 1951. That appears on page 5. The pending question has to do with whether or not this so-called prospectus, 357, says there was a loss of operating revenue from loss of passengers during the early part of 1951, is that right?

The Witness: Your Honor, what I had in mind is this: It says during the last three months of 1950 scheduled performance suffered badly as a result of accumulated maintenance, inadequate parts levels, inadequate maintenance facilities, which went into—through into 1951. That is what I had in mind. I am sorry.

(272) Q. You knew that the regular means by which immigrant passengers could secure the necessary documents in order to move from Italy to Venezuela were through the office of Agregado Emigracion which was held by Mr. Savino? A. That depends on what qualifications you give to an immigrant. We use to use the word immigrant for those immigrants who were processed through the office of immigration but there are a lot of immigrants who don't fall in that category. They are a different kind of immigrant that wouldn't have to go through Mr. Savino's office.

Q. You are familiar with, Colonel, with a Mr. Ferrindino? A. Yes, I know Mr. Ferrindino.

Q. You know Mr. Gabral Franco? A. Yes.

Q. And you know who Mr. Castellano was? A. Yes.

Q. All these people were related in one country or another to the procurement of passengers for the company either as advertising agent, or as a sub-agent, or as representative of the company? A. They were related to the company, to this (273) company and to all airlines in those countries.

Q. Were they not, all during 1950 or 1951, either indicted or dismissed or otherwise discharged from the country and from your company by reason of arranging immigrant transportation by means other than using the office of the Agregado Emigracion?

Mr. Nickerson: Excuse me. He hasn't testified they were employed by his company at all. He testified they were independent agents. I object to the question on that ground and on the further ground that it is completely irrelevant.

The Court: Yes; Until you have shown some connection between the witness and these other persons, I don't see how the question is relevant.

Q. Mr. Ferrendino, he was the immediate predecessor of Mr. Cover as the manager in Italy, wasn't he? A. He was traffic man for Mr. Wooten.

Q. Was Mr. Wooten engaged in the movement of passengers from Italy to Venezuela? A. He had signed an agreement with CAVE or AVE to take over traffic procurement in Rome.

Mr. Nickerson: Your Honor, may we have a date on this? Because it is all long prior.

The Court: Was the agreement in force during (274) 1950 and 1951?

The Witness: No, sir.

Q. Now, you weren't moving passengers from Italy to Venezuela except during 1950 and 1951? A. Yes. The agreement was signed in New York in 1949 and expired if—I don't recall exactly when, in February or March, 1951.

Q. When Mr. Wooten was engaged, as you tell us, using the services of Mr. Ferrindino, this was in order to serve your company in procurement of passengers, was it not?

Mr. Nickerson: Your Honor, I object to all this business at this early stage, otherwise we are going to go all through this for a whole year.

Mr. Schoenwald: I am going to, if your Honor pleases—I want to show that the witness knew and that the company had knowledge that the procurement of passengers by means of the use of means other than the Agregado Emigracion was fraught with difficulty, was illegal, and all those persons were engaged in such activities directly or indirectly on the part of the company. And I mean the defendant had knowledge—and he told us that he had known who they were—they were either indicted or returned to the country, and that, (275) at a subsequent date, I submit, they proposed to engage in such activities again as the only way in which this airline might obtain passengers in the future, knowledge in the possession of the defendant company, not communicated to the plaintiff.

The Court: It seems to me you are putting the cart before the horse. You should show any connection between the witness and his company and any illegal undertaking and establish details. At this point it is both irrelevant and prejudicial. Those are, as I understand it, independent agents. This man Wooten you have referred to ceased to have

any contractual arrangement, according to the witness, early in 1951, shortly after the contract was entered into. So there is no relevant basis for your further questioning.

Mr. Schoenwald: Except I would like to demonstrate knowledge on the part of the witness of the impropriety of such procedure, so when such procedures—so when they are proposed again in this document he cannot deny knowledge of it.

The Court: I think you are inverting the proper procedure. I suggest to you that the proper way to establish it would be, bring home the time of the knowledge and the fact of the knowledge, and then, (276) depending upon the foundation which you have laid by that process, then to ask proper relevant questions thereafter.

Mr. Schoenwald: Thank you.

The Court: You haven't established, in my opinion, a sufficient foundation.

Q. Gabral Franco was an advertising agent for the company, was he not? A. No, he was not.

Q. He was not? This Mr. Wooten, who was an independent, whom you refer to as an independent agent, as a matter of fact, he was a substantial stockholder in your corporation, was he not? A. He was, yes.

Q. And, as a matter of fact, he supplied not only an airplane but a lot of your operating capital, did he not?

Mr. Nickerson: This is way back in 1950, January of 1950. This is a year and a half before the contract was entered into. I cannot see the slightest relevance of it.

The Court: Sustained.

Q. I show you Plaintiff's Exhibit 308 for identification.

(277) Mr. Nickerson: What is the date?

Mr. Schoenwald. Let the witness answer.

The Witness: September 4th—is that this same one? September 4th?

Q. Yes, September 4, 1950. Now, can you identify that letter for us by telling us who sent it and telling us whether you received it and the character or nature of the person who sent it to you? A. It was sent by Mr. De Castro.

Q. Who is Mr. De Castro? A. General traffic manager for AVE.

Mr. Schoenwald: I would now like to offer this document in evidence.

Mr. Nickerson: I object to it, your Honor. It is way back in September, 1950.

Mr. Schoenwald: If nothing else, your Honor, it relates to the credibility of the witness in so far as the letter describes Mr. Franco as the advertising manager and describes the nature of his activities, the witness having testified he wasn't an advertising manager.

The Court: I cannot see the date on this communication.

Mr. Schoenwald: I think the witness testified (278) that it was in 1950.

The Witness: From the letter, your Honor, original letter.

Mr. Schoenwald: The letter right behind it, which is this translation. Would you show it?

The Court: September, 1950. I sustain the objection on the ground that the time period between the date of that letter and the transaction with which we are here concerned is so great that it couldn't have any possible relevance.

Mr. Schoenwald: Sir, in connection with the witness' statement that Gabral Franco was not the advertising manager of the company, and the apparent indication from an officer of the company that he was the advertising manager of the company, this document would seem at least to reflect upon the credibility of the witness and ought to be admitted for that purpose.

The Court: I think you are dealing with minutia. You get into immaterial matters which are so unimportant compared with the strain and stress of unduly adding to the record in this case by putting in a long typewritten communication. I hardly think it worthwhile.

What was your testimony concerning Mr. Franco's (279) position in 1950?

The Witness: I tell you, it is not, because he was never on our payroll.

The Court: He was never on your payroll?

The Witness: Never on our payroll.

The Court: What business connection did he have with your company, if any?

The Witness: He was a procurer of passengers through our general agent.

The Court: Did he work on a commission?

The Witness: He worked on a commission basis, yes.

The Court: Which he collected from your general agent?

The Witness: From our general agent. It says so in the letter, as he did from all other—

The Court: Did he do that with other airlines?

The Witness: With all airlines.

Q. During 1950 and 1951 was it not your understanding that the largest single agent for the procurement of pas-

sengers of your company was a Mr. Castellano, who was in charge of the agency you called Atlantique? A. He was one of our sub-agents or general (280) agents, I don't remember what, in Rome.

Mr. Schoenwald: I should to your Honor that answer was not responsive.

Mr. Nickerson: Will you keep your voice up?

(Question and answer read.)

The Court: He wanted to know whether he was the largest procurer of passengers.

Mr. Schoenwald: Or a very large one, a substantial one.

The Court: Was he the largest or one of the largest of procurers of passengers at that time?

The Witness: I would say that he procured a lot of passengers for us but I wouldn't qualify how many. I don't remember that.

The Court: Was he one of the important ones?

The Witness: Yes, he was one of the important ones.

Q. Is it not a fact that his services were removed from being available to the company; that the company was denied his services by reason of his being arrested for emigrant irregularities and for lacking a proper license to issue the papers and to sell tickets to immigrants?

(281) Mr. Nickerson: May we have a date first?

The Court: Yes, fix the date.

Q. On or about May, June and July, during—somewhere in the period of May, June, July, 1951. A. No, I don't remember that.

Q. You don't recall his being arrested? A. I don't recall. I didn't have any direct communication with him. He acted

through our office in Rome, and I wouldn't be directly connected with that.

Q. Did you receive any indirect information advising you that one of your large sources of business had been arrested in connection with the procurement of passengers improperly? A. I don't recall specifically.

Q. Do you recall generally any such knowledge? A. I recall that I had some indirect information about Castellano having some trouble in Italy but I cannot say what that kind of trouble was. I don't remember, at least, if I knew at that time.

Q. You weren't—

Mr. Nickerson: May I move to strike out all the previous because I don't see how it has any relevancy at all.

The Court: Yes, motion granted.

(282) Mr. Schoenwald: Your Honor, I would like to answer on the record: The reason I think it has relevancy—

The Court: But you haven't established anything. You have asked the question and the witness has no recollection. On the basis of that it doesn't seem—

Mr. Schoenwald: The witness has heard that he had some general difficulty about it. I would like to continue further as to the nature of the difficulty.

The Court: He has already stated he didn't remember the type of general difficulty he got into in Italy and he can't remember specifically or generally. Is that your testimony?

The Witness: That is my testimony, yes, sir.

The Court: It adds nothing.

Q. You went to Italy, did you not, in August, 1951? A. Yes, I went to Italy in August, 1951.

Q. You noticed at that time that Mr. Castellano was no longer in and about the offices where he had been formerly, didn't you; that he had disappeared? A. I didn't know he was around the office before. I knew that he procured passengers for us and gave us (283) an amount of traffic, but I didn't know what his relation personally was with the office, I mean, physically.

Q. In August, when you went to the company's offices in Italy and you spoke to the officers of the company, you asked them how passengers were developing, did you not? A. I didn't. I wasn't in charge of traffic. I wasn't interested in traffic.

Q. Had you received any complaints from USOA, from Mr. Burger, from Mr. Cox, that there were no passengers or very few passengers at this time; that they were much concerned about the matter?

Mr. Nickerson: Did you fix the time?

The Court: August, 1951.

Q. Some time, as a matter of fact, didn't you, around August, 1951, receive a communication from Mr. Cox telling you that they had much difficulty and there seemed to be inadequate passengers and wouldn't you please do something about it? A. Yes, I received that letter.

Q. After you received this communication from Mr. Cox you did go to Italy? A. To his request, yes.

(284) When you got there you didn't ask anybody about whether there were passengers or not, is that right? A. I went over there and I talked to Mr. Burger, who was in charge of operations, and he had Mr. Van Boheman in charge of traffic, and they were procuring their own traffic and we—

Mr. Schoenwald: Now—

Mr. Nickerson: Could the witness finish his answer?

Mr. Schoenwald: (Continuing.) I move that the answer be stricken as not responsive.

The Court: No, I will allow it to stand.

Finish your answer.

A. (Continuing.) And we talked about traffic but I was not in a position to judge or to do anything about traffic specifically since they were in charge of it and I wasn't in charge of it.

Mr. Schoenwald: I am going to—that is not responsive to my question—ask that it be stricken.

The Court: No, denied.

Q. In Italy, when you got there, you found Mr. Cover was in the office, wasn't he? A. Yes, he was in the office.

(285) Q. You knew him? He had been, as a matter of fact, he had been the manager in Italy for some time? A. He was, yes.

Q. You knew the other employees of the office, didn't you? A. I had them as my employees.

Q. And they were working there at that time, weren't they? A. They were, yes.

Q. You were there because there were complaints about a lack of traffic? A. No, not because of lack of traffic.

Q. You had been asked to go there by Mr. Cox because there wasn't any traffic? A. Because they said they had difficulty with our franchise, which was my obligation.

Q. Had they asked you to go under any respect because of difficulty over getting passengers? A. I got the letter from Mr. Cox, and before I got the letter from Mr. Cox—I got a letter from Mr. Cox after I had got to Rome because the letter was sent on the 23rd, I think, and the same day or day before cable was sent to me urging me to go to Rome direct, even before I received that letter.

(286) Q. Didn't you receive a number of cables advising you that passenger traffic was off both from Italy and from Venezuela, telling you, that they just couldn't get loads and they couldn't move the airplane? A. I would have to refresh my recollection on that.

Q. You don't recall anybody indicating to you that there were no passengers, is that right? A. On what date, Mr. Schoenwald? In Caracas?

Q. The only date that we could be concerned with Colonel, I think, is August and early September, that is, 15th or 16th of August on to September because the plane started to fly in August and I think they stopped flying from early in September. So in this area of my questioning that is the period I am referring to. During those two or three weeks from August 16th to September 9th did you receive any letters or correspondence or reports telling you that there wasn't any traffic of substantial nature at the various stations? A. I recall I talked about it. I had general knowledge they were having traffic difficulty in procuring passengers but I don't recall any specific telegram or letter. I might have received it but I can't (287) recall it right now.

Q. You were still president of this airline, weren't you? A. Yes, I was.

Q. During this period from August 16th to September 9th you knew the airplane had flown but two trips? A. Yes, I did.

Q. You knew it was supposed to fly, instead of two trips, something like six or eight trips? A. Yes.

Q. Was this a source of concern to you? A. Of course it was.

Q. In view of the fact that the airplane was hardly flying because—hardly flying, did you make any efforts to find out why the airplane wasn't flying? A. Of course.

Q. What effort did you make? A. I asked them, "Why don't we keep our contract? We had a contract."

Q. What did they tell you about the passengers at that time? A. They weren't going to fly but with full loads.

Q. When you got to Italy did you make any inquiry (288) about the number of passengers that were available in Italy? A. I did not.

Q. You were on the payroll of this operation, weren't you? You were supposed to get a salary? A. Conditioned to certain—

Q. Events? A. —stipulation in the contract.

Q. Did you think one of your responsibilities—or, did you consider it as part of your responsibility, in order to earn this salary to find out why the planes weren't flying and why the planes weren't filled with passengers? A. No. If they weren't flown because of franchise and other related matters, it was my responsibility. I didn't have any responsibility for operation at all or traffic.

Q. Did you do anything to assist the procurement of passengers? A. I did my best.

Q. What did you do? A. I told USOA people that they had nobody in Caracas to help them with that duty for them in Caracas. (289) I went to Rome direct to the immigration representative who was there then, Mr. Ramera Torres and asked him to cooperate with USOA in line of anything he could do for them within the scope of his duties.

Q. What about—

* * *

A. And he offered to cooperate and I talked with Mr. Burger, and I introduced him to Mr. Ramera Torres and asked Mr. Ramera Torres to cooperate with Mr. Burger as well as he could within the scope of his obligation.

Q. I am more interested at this point in the passengers out of Italy. Did you do anything to put people in airplanes out of Italy? A. I said that I didn't feel it my obligation to do that.

Q. Did Mr. Burger or Mr. Van Boheman complain to you about the lack of passengers? A. They talked to me about it but they didn't complain to me.

Q. What did they tell you about it? A. They told me that they were trying to promote the traffic; they were making arrangements. That was (290) their job and not mine.

Q. When they told you, as part of telling you they were trying to promote the traffic, did they suggest there wasn't any traffic? A. I don't recall that expression.

Q. Then you have no impression then with respect to the question of whether or not there were people of any quantity riding in this airplane out of Italy? A. They only made one trip out of Italy, and I know they brought about 40 passengers, if I am not mistaken, on the return trip.

Q. You have no impressions other than that with respect to the number of passengers available to fly out of Italy during these six weeks? A. To my recollection I think they had, two or three times, they had full loads, as they call, and at the last moment, I don't know why, I remember Burger's expression, it would fall apart, and I didn't delve into it because I didn't feel it was my obligation to interfere with them in their procurement.

Q. You weren't going to get your salary paid unless there were passengers on these airplanes, were you? A. That is right.

Q. And, therefore, wasn't it incumbent upon you (291) to make some effort to see that your salary was paid?

Mr. Nickerson: I think that is a matter governed by the contract.

The Court: Yes. It is argumentative. I sustain the objection.

As I understand it, Colonel Marcano's direct interest stemmed from the volume of business to be done by the operation, did it not?

Mr. Nickerson: Yes, your Honor, I believe, other than the $3,000 guarantee, he was to get a salary but only if they attained a 50 per cent load factor.

The Court: I take it that one of your primary concerns, Colonel, was to preserve this franchise that you had?

The Witness: That was my understanding.

The Court: So your primary concern was to keep this plane flying, if you could, so you wouldn't lose your franchise?

The Witness: That was it.

The Court: As a business matter, if you could keep on flying long enough, you would preserve your franchise?

The Witness: Yes, sir.

(292) The Court: And keep it from being cancelled?

The Witness: That was my main concern.

The Court: So actually, if they flew with no passengers, but kept on flying, you were protected in your franchise.

The Witness: Yes.

The Court: If they flew with full loads, you would get a contingent income?

The Witness: Yes, sir.

The Court: If they flew with partial loads you would protect your franchise but get no income.

The Witness: That is it, from salary.

The Court: It seems to me, Mr. Schoenwald, that we are squarely within the realm of what these gentlemen agreed to do and what their contractual obligations were.

Mr. Schoenwald: I submit to your Honor—

The Court: All right, go ahead, Mr. Schoenwald.

Mr. Schoenwald: I think your Honor was in the middle of a comment and you were interrupted. Did you want to finish that?

The Court: I think I had better stay interrupted. I withdraw the comment. Put a fresh (293) question.

Q. Now will you please identify this paper, which is now marked Exhibit 321 for identification?

Mr. Nickerson: Will you give me the date?

Mr. Schoenwald: July 9, 1951.

A. Yes, this is a letter from—I don't see any signature—yes, it's a letter from Mr. Cover.

Q. That is the same Mr. Cover whom we have adverted to before, isn't it? A. Yes, he is.

Mr. Schoenwald: I would like to offer this document in evidence pursuant to the same stipulation previously referred to.

Mr. Nickerson: I am sorry, your Honor. I haven't seen this one. May I examine it?

The Court: Could Mr. Schoenwald go on to something else for the time being?

Q. Now, when you got to Italy in August, 1951, you received a report from a Mr. Botto, I believe. First let us find out, who was Mr. Botto? A. Mr. Botto, he is somebody who was employed by us in 1951, if I am not mistaken, latter part of the operation anyway.

Q. Mr. Botto was employed by you as the assistant (294) to the general manager, Mr. Cover? A. Yes, he was then in some capacity I cannot remember right now, but he might have been assistant manager.

Q. You received communications from him from time to time, signed assistant manager in Europe? You didn't make any objection? A. I concede he was assistant manager.

Q. Is this a copy of the report that you received from Mr. Botto on August 2, 1951? A. Yes, this is a copy of a report I received from Mr. Burger the night before we left Rome or the night we left Rome, and I didn't receive it from Mr. Botto.

Q. The copy of this report that you received from Mr. Burger, what did you do, did you give it back to Mr. Burger? A. I don't know. I don't remember.

Q. Did you note that the report was addressed to you? A. Yes, it was addressed to me.

Q. Did you express any surprise as to why it was addressed to you instead of Mr.—that Mr. Burger was the person who was delivering it to you although (295) he is not the person who signed it? A. No, expressed no surprise. Mr. Burger told me, "I have this report from Botto. Take a look at it."

Mr. Schoenwald: I would like to have this marked in evidence.

Mr. Nickerson: No objection.

Mr. Schoenwald: Exhibit 141-B.

Mr. Nickerson: No objection on 141 for identification.

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(296) The Court: Who is Tito?

Mr. Schoenwald: Tito was an abbreviated name, I think we all agree, for Cover.

Q. Isn't that right, Colonel? A. That is right.

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(297) Marked Plaintiff's Exhibit 321 in evidence.)

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(Marked Plaintiff's Exhibit 141 in evidence.)

Mr. Schoenwald: If your Honor please, I would like counsel for defendant to acknowledge that 141

is the same as Exhibit 121 marked during the deposition before trial.

• • •

Mr. Nickerson: I concede that is the same exhibit that is referred to as Defendant's Exhibit 121 in the deposition.

The Court: 141 and 121, thank you.

Mr. Schoenwald: Reading from the deposition of Colonel Marcano on page 396:

"Q. I show you Defendant's Exhibit 121 and ask (298) you the circumstances under which you received that document? A. It was given to me in the Rome office.

"Q. By whom? A. I cannot remember if it was given to me by Botto or somebody in the office.

"Q. After you received it did you discuss it with the persons from whom you received it? A. No.

"Q. Did you discuss it with Mr. Burger? A. I don't remember discussing it with Mr. Burger.

"Q. Did you discuss it with Mr. Cover? When I say 'it', either the document itself or the contents of the document. A. To the best of my recollection before I received this document, Cover told me that Botto had some confidential report that he wanted to give me about traffic and, if I remember well, I told him that all the traffic matters were in Burger's hands and that that should be discussed with Burger. So that I got this document and I may have discussed it with Burger or Cover, but I cannot remember because I didn't feel it was within my scope. I mean, (299) it is within—" and then there is a motion to strike out part of that statement by the examiner at that time.

"Q. Now, Colonel, I think twice today during your testimony you have indicated to us by way of explanation that the prospectus contains a statement that scheduled performance during 1950, the last few months of 1950, sur-

fered badly; is that in your recollection? A. It is right.

"Q. Colonel, I draw to your attention the fact that the prospectus says that during the seven months period, presumably—

Mr. Nickerson: What page?

Mr. Schoenwald: Page 5, first paragraph.

"Q. (Continuing.) I draw your attention to the fact that the prospectus says on page 5 that during the seven months period in 1950, this representative period, that your average scheduled performance was about one and a half trips per week. Was it not a fact that, as a matter of fact, during the last three months of 1950 your schedules were better than they were during the period, seven months representative period, better than the one and a half trips per week referred to (300) in the prospectus, and, as a matter of fact, about as good as at any time as it was during the entire operation of the airline from January, 1950, up to the beginning of May, 1951? A. I don't remember that.

"Q. I show you a paper and ask you if you can tell me what that paper is? A. Yes, a breakdown of traffic during the month of December.

"Q. As a matter of fact, doesn't that show that during the month of December there were at least one and a half trips per week?"

The Court: That is December?

Mr. Schoenwald: 1950, yes, your Honor.

Mr. Nickerson: Dated December, 1951, your Honor, but I think it is a mistake. It must be December, 1950.

The Witness: It is January, 1951.

Mr. Nickerson: I am sorry. I withdraw that.

A. We had five and a half round trips during that month.

Q. I think it says six flights, doesn't it? A. One way six flights, the other way, and five (301) flights from Caracas. Only five from Caracas and six from Rome.

Q. That was pretty good compared to the rest of your period of operation, wasn't it? A. It means one flight per week—it means less than one and a half flights per week.

Q. Will you tell us what these papers are? A. Those are accounting papers.

Q. Can you tell me what they describe? They describe the income of the various months from flights, regular scheduled flights of your company, from its inception until the period you stopped operating end of April, 1951, don't they? A. They seem to describe part of it. I don't think it is all of it but it is—

Q. Perhaps this paper will help you. I show you Exhibit 37 for identification, consisting of two pages, covering 1951, and if you will turn over the page you will see covering the various months of 1950, and is that descriptive of your income from irregular flight operations during the periods referred to on this paper, Exhibit 37? A. I am not familiar with accounting, really. It looks like it, but I would like to qualify it myself—(302) I mean, I would like to have someone qualify it—

Mr. Schoenwald: Mr. Nickerson, I call upon you to produce from your records the original of this paper which we obtained from your files.

Mr. Nickerson: I haven't got it, your Honor.

Q. Would you tell us, Colonel, whether or not the words appearing on the top of this page indicate the route of your company? A. Where?

Q. The words "Caracas, Europa, Caracas"? A. Yes, that is.

Q. That is generally descriptive of the route? A. Yes.

Q. And that word "Ventas", that means sales, doesn't it? A. Yes.

Q. This means "transported"? A. Transported, yes.

Q. Those are amounts (indicating). And these months that are mentioned are in fact the only months your company flew in international business, isn't that right? A. January, 1950.

Q. And then the few months of 1951? (303) A. Yes.

Q. With the aid of a reference, "Caracas Europa Caracas," and a statement, "Sales," the amounts, and the months, would that refresh your recollection, and your examination of the amounts there, would that refresh your recollection as to what that paper is?

Mr. Nickerson: He has already testified—

A. I told you. I told you that is an accounting paper.

Q. An accounting paper of what, Colonel?

The Court: He hasn't been able to tell you anything more than that it is an accounting paper. Apparently it doesn't refresh his recollection. I don't see what purpose this serves by questioning him.

Mr. Schoenwald: Your Honor, it is apparent from the face of it that this is a sales report of the company, and I would like to follow it up by asking the witness whether or not an examination of this sales report shows him that, as a matter of fact, the three months period he says was performed badly is, as a matter of fact, one of the periods when they enjoyed their best income.

The Court: What period?

Mr. Schoenwald: Last three months of 1950.

(304) The Court: Looking at this paper are you able to state whether the last three months of 1950 were an exceptionally good operating period from the point of view of transporting passengers?

The Witness: No, your Honor.

The Court: You are not able to?

The Witness: I am not able to.

The Court: One way or another.

The Witness: No, sir.

Mr. Schoenwald: I ask that this paper be marked in evidence as the document produced from the defendant's files and stipulated to as part of the record as produced from defendant's files.

The Court: What do they mean? I don't like you to freight the record, just because it is produced from the defendant's files, unless there is something to show what it means which will enable us to get something cogent and significant in the record. I just don't want to be piling paper upon paper here.

Mr. Schoenwald: If your Honor pleases, the document states, on the very top of it—

The Court: Let me see it.

Mr. Schoenwald: Thank you.

The Court: I had better look at it.

(305) Mr. Schoenwald: It is the two pages of 37.

The Court: Will you put a question to the witness so we can go on to something else?

What does the term "Ventas," followed by a capital B with a small mark after it in the first column indicate, Colonel Marcano?

The Witness: Ventas and bolivars.

The Court: That means sales?

The Witness: Sales in bolivar.

The Court: In Venezuelan currency?

The Witness: In Venezuelan currency, yes, sir.

The Court: And the term "transported," what would that indicate?

The Witness: I don't know what transported would be exactly, sir, because it might be passengers or cargo or mail.

The Court: Does it represent an amount of money or units transported?

The Witness: It represents, to my knowledge, amount of money, because that is 238,000. So it must be money.

The Court: The next column indicates, under the head "D-i-f-b-r"—does that mean difference from (306) bolivar?

The Witness: It must be difference in bolivars.

The Court: Are you able to interpret or explain these papers for us or are they beyond your capacity?

The Witness: I am afraid that I wouldn't be talking with certain knowledge of them. I am afraid to do it.

The Court: I will refuse to accept them in the record until they are properly interpreted and explained. They are in Spanish. They are replete with figures and symbols. They wouldn't be clear to anybody except somebody familiar with the particular method of bookkeeping followed by this company.

They appear to be records kept in the normal course of business but, without further explanation, I don't see how they can be of any use to me.

* * *

Q. Will you tell us who Sergio Tommassino was? A. He was our legal representative in Italy.

(307) Q. Would you identify this paper for us, Exhibit 156 for identification?

Mr. Nickerson: Give me the date.

Mr. Schoenwald: April 25, 1951.

A. Yes, it is a letter from Tommassini.

The Court: Addressed to whom?

The Witness: Addressed to Colonal Marcano, to me.

(308) (Marked Plaintiff's Exhibit 156 in evidence.)

Q. Did you receive requests from time to time from Mr. Cover and others asking you to use your influence to obtain visas and the suggestion that it wouldn't be unreasonable for you to pay up to $200—pardon me, 200 bolivars for each visa you could get so passengers could be transported during 1950?

Mr. Nickerson: May we have a date?

Mr. Schoenwald: During 1950 is the best I can do, at this point.

Mr. Nickerson: I object to it, way prior to the contract.

The Court: Sustained.

Q. Did you advise the plaintiff in this action or Gotch and Crawford or Mr. Marshall that you had received indications that, as a matter of fact, the chance of earning any funds from the carriage of mail from April 10, 1951, forward was practically absent? That there was no chance of getting money from mail? A. Mail?

Q. Mail, earning money by reason of the transportation of mail from one country to another? A. I don't remember that.

(309) Q. I show you Plaintiff's Exhibit 161 for identification and ask you if you can tell us what that letter is? A. This is a letter from Cover dated April 10th.

(Marked Plaintiff's Exhibit 161 in evidence.)

Q. Can you tell us what this document is? I show you Exhibit 160 for identification. A. Yes, it is a letter from—

Q. Fletemar? A. From the agent in Madrid.

Q. That was Fletemar? A. Fletemar, yes.

Q. Colonel, did you report the contents of Exhibit 160 to USOA or to John Marshall or to anybody whom you instructed to advise about it?

* * *

(310) The Court: I will allow him to answer whether he reported it or not.

The Witness: I did not.

* * *

(Marked Plaintiff's Exhibit 160 in evidence.)

Q. I want to go to another topic, Colonel, if you will. Do you recall that you saw a Mr. Webb, who was an employee of USOA, in Caracas some time in September? A. Yes.

Mr. Nickerson: 1951.

Mr. Schoenwald: 1951.

Q. Was Mr. Burger there too at the time? (311) A. In Caracas, time when I arrived from Rome, we met at the airport Mr. Webb who was waiting there. I was introduced to him and he left with Mr. Burger.

Q. Shortly thereafter you undertook a trip up to New York, did you not? A. I did, yes.

Q. Present in the airplane were yourself and Mr. Burger and Mr. Webb? A. Yes.

Q. And, as a matter of fact, even in the course of preparing for this trip you had an opportunity to see them down in Caracas several times? A. I didn't see Mr. Webb until we went to the airplane, back again to take the plane for New York, and I took it—

Q. You did see Mr. Burger? A. I don't recall seeing Mr. Burger either.

Q. How did you know they were there? How did you devise to go into the airplane? If you didn't see either Mr. Webb or Mr. Burger, how did you happen to be on board with them? A. Mr. Burger immediately asked me to go to New York, which I didn't want to do, and he said it was very important I come to New York because he thought (312) I should talk to Mr. Cox and straighten out certain things about the operation.

Q. Then you saw either Mr. Webb or Mr. Burger? A. Mr. Webb.

Q. In Caracas? A. In Caracas.

Q. Prior to getting on this trip. Then you were with them on the trip? A. We were on the trip together.

Q. When you arrived in New York at the end of the trip you shared a hotel—or you stayed at the same hotel? A. No, we weren't staying at the same hotel.

Q. You saw them when you arrived in New York? A. I saw them arrive in New York.

Q. You had breakfast or lunch with them? A. Yes.

Q. During the course of arrival—during the time in September, 1951, when Mr. Burger and Mr. Webb came to Caracas and invited you to fly by plane with them up to New York and during this lunch or breakfast you had in New York following that, during these events there was some discussion, was there not, by Mr. Burger, and Mr. Webb on the possibility of terminating this (313) operation, wasn't there? A. No. Mr. Webb told me on the way to Bermuda—first he tried to tell me he had an airplane and—he had somebody who had an airplane and a lot of money—and that it will be much better to go into business with him than to stay with Mr. Cox. I told him I had a contract with Mr. Cox and I intended to live up to my contract. So, after discussing that point, either Mr.

Webb or Mr. Burger came back and told me that Mr. Cox had sent Mr. Webb to take the airplane out of the route, which I didn't discuss with him.

Q. This airplane that Mr. Webb said he had, that was the same airplane with the USOA he had? A. He said the same plane USOA had on the run to Europe.

Q. Mr. Webb said part of this airplane belonged to him? A. To him and Mr. Clemett.

Q. But you also knew that USOA or Ocean Air Transport had claimed title to this plane and, as a matter of fact, had given a bill of sale to CAVE for it and you gave a bill of sale back? A. Yes.

Q. And, as a matter of fact, Mr. Webb indicated (314) that a substantial part of this plane was in fact owned by U. S. Overseas or Ocean Air— A. He said half of the airplane was his and Clemett's and half Overseas or Tradeways.

Q. He told you he would take this airplane from its present purpose or from its present utilization by the USOA and make it available to you? A. He proposed that to me, yes.

Q. And then from that point on they began to discuss—from that point on they began to discuss means of carrying this out, didn't they? A. I never discussed any means of carrying it out with them.

Q. I didn't say that. Mr. Burger and Mr. Webb began to discuss it? A. I don't know—

Q. Did you hear them discuss this at all? A. They were discussing about carrying out the operation. I didn't intervene in any—

Q. I want to make clear in my mind—I am not asking you whether or not you intervene. A. Yes.

Q. So by proposing to me that you didn't intervene, I think you confuse me a little bit. Did (315) you hear them discussing the matter? A. Yes, they discussed it in front of me.

Q. What did you hear them discuss? A. That it was a good operation; that it was a shame that Mr. Cox would break the contract; and they should look for a means of carrying it out in case he did break the contract.

Q. Did you hear them talk about the means by which they were going to carry it out? A. No. When I say the means—

Q. Did you hear them discuss any technique that they would use to get possession of this airplane? A. I don't know if they were going to get possession of the airplane. They were talking about carrying out the operation; that they would like to go into it and carry out the operation.

Q. Did you hear them refer at any point to getting title to the airplane? A. To geeting title to the airplane?

Q. That is right, ownership of the airplane. A. No. When we were going back, from Bermuda, I sat on a seat by myself, and Webb and Burger came together and talked together, so forth. I was reading a book. Mr. Webb told me that his part of the airplane, (316) his and Mr. Clemett's part of the airplane, was in peril because Mr. Cox wanted to steal it from them. Well, he kept on talking. He says the only way he could get back his title was to go to Wildwood and secure some kind of paper he had there that would prove that he had ownership of half of the airplane, he and Clemett. So he kept talking with me and he asked me, he said, "Well, please do something, don't call Mr. Cox until I get my paper," whatever it is.

I told him I had to talk to Mr. Cox; that I didn't have any specific hour to call Mr. Cox but that I would make sure that as soon as I could, I would talk to him because we had to talk over the contract, which apparently he wanted to break.

Q. I want to see if this is understood correctly: You helped out Mr. Webb by deferring to call Mr. Cox, you helped out Mr. Webb in the problem about title to the air-

plane by refraining from calling Mr. Cox promptly so that Mr. Webb could go down to Wildwood, where USOA lines keeps its business, and take the bill of sale to this airplane out and put it in his own possession.

Mr. Nickerson: Does that purport to be a summary of what he has testified to?

Mr. Schoenwald: I am asking him if that is (317) the fact.

A. That I helped Mr. Webb?

Q. Let me break it up. A. Yes, please.

Q. Did you tell Mr. Webb you wouldn't place this phone call immediately? A. I did not.

Q. Did Mr. Webb ask you not to place the phone call immediately? A. He didn't ask me not to place it.

Q. Did you place it immediately? A. I placed the phone call as soon as I spoke to my lawyer.

Q. You spoke to your lawyer about it? A. Yes.

Q When you heard that Mr. Webb was planning to go to the safe of the U. S. Overseas Airlines and take out the bill of sale to this airplane, did you report this to anybody in the U. S. Overseas Airlines?

Mr. Nickerson: I object to the form.

The Court: Yes, sustained. You must refrain from paraphrasing or purporting to summarize testimony. You may ask whether he reported and, if he reported, what he reported.

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(318) Did you report to anybody in the U. S. Overseas Airlines any material relating to the conference between Burger and Webb with respect to the removal of this bill of sale? A. No.

The Court: When you say you called as soon as you phoned to your lawyer, whom did you call and what did you say?

The Witness: I called Mr. Cox's office after I had talked to my lawyer in the morning.

The Court: Did you speak with Mr. Cox?

The Witness: I couldn't get hold of him.

The Court: Who did you speak with?

The Witness: I don't know. I think it is—I spoke to somebody in the office, some operator or something, and Mr. Cox wasn't available. I don't know exactly who I talked to.

Q. Did you ever tell Mr. Cox that Mr. Burger and Mr. Webb had been discussing an attempt to take the bill of sale out of the safe and put it in their own control?

Mr. Nickerson: I object to the form of the question.

(319) The Court: Yes, sustained. I have already asked you not to ask questions in that form.

Q. Did you ever tell Mr. Cox about this removal of the bill of sale?

* * *

The Court: Do you get the question, Colonel Marcano? Did you ever talk with Mr. Cox, by phone or in person, about the safe in Wildwood or about the bill of sale of this plane?

The Witness: I never had the opportunity.

The Court: The answer is you never did?

The Witness: No, I never did.

Q. Shortly thereafter you met Mr. Cox in a conference, did you not? A. Yes.

Q. Did you report it at that time? A. No, I did not.

(320) Q. At any time thereafter? A. No.

Q. Colonel, I show you Exhibit 114-A for identification and ask you to tell me what that letter is, particularly who it is from, of September 14, 1951? A. This is from Fletemar and it is dated September 14, 1951, from Madrid.

Q. When you are finished looking at it, I would like to have it.

Did you undertake to discuss the contents of this letter with anybody from U. S. Overseas Airline?

Mr. Nickerson: Your Honor, how could he? It is dated September 14th, addressed to Caracas, and he was up here in New York. That was the day they breached the contract.

The Court: He may say whether he did or he did not.

A. I did not.

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(325) HENRY SCHINDALL, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Schoenwald:

Q. Mr. Schindall, what school did you attend, or professional schools, colleges? A. I attended the College of the City of New York, Columbia University.

Q. What degrees do you have? A. I have a Bachelor of Social Science and Master of Business Administration.

Q. Are you on the faculty of the College of the City of New York? A. Not now. I was some years ago.

Q. What did you teach? A. I taught accounting, business administration and taxes.

Q. Are you a Certified Public Accountant? A. I am.

Q. How long have you been engaged in the practice of accounting? A. About 18 years.

Q. Have you had an opportunity to examine the profit and loss statements and balance sheets and other (326) books and records of the defendants in this action? A. Yes, sir, I have.

Q. Did you visit the offices of the defendant's counsel during part of the examination to see these papers and records? A. Yes, I did.

Q. Have you had an opportunity to examine Plaintiff's Exhibit 357, prospectus that has been referred to at various times? A. Yes, sir.

Q. I ask you to look at page 2 of that document, paragraph numbered 2 of that document, and also at the top of page 5 of the same paper, where I think you will find similar material, and also at page 6, where the balance sheet appears, particularly referring to the second numbered sentence at the beginning of page 2, paragraph 2, and ask you if this sentence deals with the operating profits of the company—well, I ask you particularly if the sentence which reads, "During 1950 AVE grossed $1,700,000 in operating revenues and showed a net operating income of $58,000. This operating income is particularly noteworthy inasmuch as it was earned during the very first year by a company which had no prior experience in either passenger (327) or overseas operations, I ask you if that is an accurate statement of the facts as you found them in your examination? A. No, sir, it isn't.

Q. In what respect is it inaccurate? A. Well, an analysis of the balance sheets and supporting material caused me to come to the conclusion that there wasn't a $58,000 net profit in 1950 but, rather, a substantial loss, which may amount to about $300,000.

Q. We asked the Colonel yesterday whether or not there was a net loss for the combined period beginning in January—

The Court: Just stop. You have no right to paraphrase or summarize testimony. Please put a

question which doesn't call for one witness to comment on the testimony of another witness.

Q. Can you tell us what the loss, if any, of this company was for that period beginning January, 1950, and ending at May 1st or the end of April, 1951? A. I would say approximately $560,000. That would be—may I amend that?

Q. Yes. A. That would be a net operating loss, loss of (328) operation for the period January 1, 1950, to June 15, 1951.

Q. How do you arrive at that figure? A. If we analyze the balance sheet in the prospectus dated June 15, 1951, we can reason this way—

The Court: Balance sheet is where?

The Witness: Page 6 of the prospectus.

Mr. Nickerson: Statement of estimated assets and liabilities, page 6, your Honor.

The Court: Go ahead.

A. (Continuing) We know that during 1951, approximately May 1st, there was a profit made by this company on the sale of airplanes which amounts to approximately $500,000. This was a non-operating profit on the sale of income producing equipment. It is not a regular profit on operations. However, the balance sheet shows here—doesn't show a $500,000 addition to the surplus. Instead, it shows a loss for 1951 of $62,000. It would necessarily follow that the $500,000 profit on that transaction of the sale of the planes was wiped out or offset by losses, not only to the extent of $500,000, but to the extent of $560,000 in order to produce this loss figure of $62,000.

(329) On the face of it, that would seem to indicate operating losses during 1951, but this would seem to be impossible because in this short period of four months' operation, with expenses which totaled only $360,000, and

with income which totaled about the same figure, there couldn't possibly have been this loss sustained, such a huge loss sustained in those four months.

The only possible conclusion is the loss was sustained prior to that time or at least substantially the bulk of it was sustained prior to that time.

Now, this conclusion can be supported by other analyses of the figures.

Q. When you say prior to that time, do you mean in 1949 or 1950? A. I mean during 1950.

Q. Yes, go ahead. I am sorry I interrupted. A. What happened during 1950 is that sales were recorded to the extent of $1,700,000 and accounts receivable were charged in the amount of approximately $600,000 existing at the end of the year.

Now, in these calculations there were no reserves set up to provide for the true value of those $600,000 accounts receivable. For example, there was no reserve (330) to provide for the amounts due from Spain, which funds were blocked, and where the Spanish currency had been devalued. So that a loss was actually taken but not recorded in 1950 to the extent of approximately $125,000.

This reserve shown on this balance sheet at June 15, 1951, but it wasn't taken or recorded at the end of 1950, which should have been done.

That is one item that would corroborate the loss as occurring in 1950.

There were other accounts receivable existing at the end of 1950 included in the $600,000 which were later written off as worthless and which, perhaps, should have been written off to a considerable extent at the end of 1950.

In other words, the existence of this large operating loss of $560,000, approximately, was there had occurred. It is not easy to place the exact time of loss as to when these accounts receivable became bad or whether they

were good when they were set up in the first place, that would require an exhaustive investigation of each account, but a reasonable analysis of these balance sheets indicates that the bulk of the loss must have occurred in 1950, so that there was, perhaps, $300,000 of loss in operation in 1950 and, (331) perhaps, $200,000 in 1951. These operating losses were not indicated, as far as I could see, in the prospectus.

Q. Now, have you seen a profit and loss statement of the defendants of 1949? A. Yes, I have.

Q. And did that reflect a separate transaction in connection with the sale of an airplane, a small airplane at that time? A. Yes, it did.

Q. Just how was that set up, if you recall? A. The balance sheet showed income, less expenses and a net operating loss, there was a small loss, as I recall, and then added at the bottom of the page was the addition of a non-operating profit, namely, profit on the sale of an airplane. I believe it was about $15,000.

There was a clear segregation between operating loss and non-operating profit.

Excuse me a moment.

Mr. Schoenwald: I would like to call upon you to produce the 1949 profit and loss statement of the defendant.

(Mr. Nickerson handing paper to Mr. Schoenwald.)

(332) Mr. Schoenwald: I would like to offer it in evidence.

Mr. Nickerson: No objection.

(Marked Plaintiff's Exhibit 4 in evidence.)

Q. Did you see anywhere in these records or in the records that were in the file of material produced by the defendant a profit and loss statement for 1951, that

is to say, profit and loss statement for June, 1951? A. No, sir.

Q. Or May, 1951? A. No, sir.

Q. But you did find a balance sheet for that period? A. Yes. The balance sheet contained net profit figures for 1951.

Q. Had there been a profit and loss statement for 1951, June 15, 1951, same period as the one on page 6 in the prospectus, what would that show with respect to the operating condition of the defendants? A. Based on these figures it would have shown a net loss on operations of about $560,000 less a nonoperating profit on the sale of the planes of $500,000, and a net overall loss of $60,000.

(333) Q. Do you have an opinion with respect to the question of whether or not the defendant corporation was solvent immediately before the sale of these airplanes? A. Yes, I do. They were—the corporation was definite insolvent on the basis of these figures.

Q. To what extent? A. About four hundred and—let us say $370,000. A capital deficiency of $370,000.

Mr. Nickerson: I am reserving my right, if I may, to strike all this out. We made no objections to the condition in 1951.

Q. Does good accounting practice or standard accounting practice require, in the presentation of a paper such as appears on page 6 of the prospectus, and in the presentation of the material contained on pages 2 and 5 of the prospectus, some form of notation other than that which appears thereon, some form of indication of the facts? A. Yes, it is considered a basic practice in accounting practice to indicate a non-operating profit where it exists in order to disclose the two situations, particularly where it is very large.

Q. Is that the practice that was used on the (334) 1949 statement?— A. Yes, it is.

Mr. Schoenwald: Now in evidence as Exhibit 4.

Q. With respect to this gross figure of $1,700,000—$1,717,000—of income for 1950, do you have any reason to question the accuracy of that statement in so far as it purports to describe the international operating income of the company? A. Well, we checked this figure, and it is the total of all income shown on the books and on the tax return and, therefore, includes some internal, local income, so it is not entirely international income.

Q. You mean it includes local domestic operations? A. Yes, sir.

Mr. Nickerson: Where is this? I am sorry.

Mr. Schoenwald: The figure, Mr. Nickerson, is adverted to on page 2, paragraph 2, and again on page 5.

Q. And to what extent did you find that even that gross figure included material other than the international operations of this company? A. Approximately $70,000.

Q. What was the source of that conclusion? (335) How did you arrive at that? A. I made a schedule of income from local traffic, which added up to $69,153.82.

Q. Now, with respect to the accounts receivable, at the end of 1950, do you have any opinion as to what the total of that was? A. Yes, about $600,000.

* * *

Q. And what was the condition of the accounts receivable at the end of or during April, 1951? A. The figure remained about the same.

Q. What hapened to those accounts receivable? A. There must have been between April 30th and June 15th,

the preparation of this balance sheet, very large writeoffs of accounts receivable which were worthless and which were not collected.

Q. Are those accounts receivable included in the figure shown for the gross income of 1950 or any part included in that figure and in the net profits for 1950? A. Yes, some portion of them must have been. It is difficult to say exactly how many related to 1950 operations.

(336) Q. Can you say with a reasonable degree of certainty that more than half of the $500,000 was lost during 1950? A. I would say so.

* * *

By the Court:

Q. Mr. Schindall, I would like to ask you one or two questions. A. Yes, sir.

Q. In connection with this statement of "estimated assets and liabilities," does the title "estimated," the inclusion of the word "estimated" in the title of this statement on page 6 in this paper that has been referred to as a prospectus, have any significance to you as an accountant? A. Yes. It indicates that the figures are not exact but are rounded off or approximated but are, nevertheless, substantially so.

Q. Would the fact that this statement shows a loss for 1949 and again in 1951 lead you to any (337) conclusion concerning its position in 1951? A. I m not sure I understand.

Q. This statement is set up as estimated assets and liabilities, which shows in 1949 a loss of $6,693, and a profit of $20,000 in 1950, and then in 1951, a loss of over $62,000. Did you consider those figures in coming to a conclusion with respect to the position of this company as of June 15, 1951? A. Are you referring to the insolvency question?

Q. Any question which you feel would be pertinent in your judgment as an accountant? A. Yes, I considered these figures.

Q. What conclusion did you come to as a result of considering them? A. In my opinion these profits and losses are stated here to indicate that there were no large profits or losses but that the company was more or less breaking even on operations.

Q. Don't you regard this substantial loss of 1951, as stated on page 6, to be a danger signal, and wouldn't anyone approaching this statement from an objective standpoint regard this company as being in rather precarious financial condition? A. Not necessarily.

(338) Q. I call your attention to the statement on page 5, at the end of the top paragraph, where it says, "During the last three months of 1950 scheduled performance suffered badly as a result of accumulated maintenance, of inadequate parts levels and inadequate maintenance facilities." I call your further attention to a statement appearing right after that, beginning, second paragraph on page 5, "throughout the operation the company suffered from inadequate working capital which had an adverse effect upon the efficiency of operation and the effectiveness of its promotional effort." And then there is a reference to the blocked Spanish currency. And then the last statement, at the end of the third paragraph on page 5, "The two DC-4s were sold in May, 1951, and proceeds used in part to meet all of standing obligations of the company."

Wouldn't those statements, particularly the last statement, showing that proceeds from the sale of equipment were used for outstanding obligations, indicate that this company was not in a good or sound financial condition? A. Yes, there would be an implication that the company had some difficulties but they—as compared (339) with the actual huge losses that were being sustained, the statements are very mild.

Q. You mean what you are saying, as I understand it, is that a more careful examination would have justified much stronger statements than those that were made? A. No, I think that disclosure of large operating losses should have been made and aren't made by these statements.

Q. You agree, do you not, that this statement on page 6 did not purport to be an audited statement of assets and liabilities as of June 15, 1951; isn't that right? A. There is no indication of any auditing having been done.

Q. It didn't purport to be a disclosure of assets or liabilities, did it? A. Oh, yes, yes.

Q. Doesn't that purport to be on its face a statement of estimated assets and liabilities? A. A statement of estimated assets and liabilities should show the true assets, and true liabilities and true capital.

Q. Do you not agree that whatever statements are (340) made, on the face of this report should be and necessarily have to be weighted by the statements appearing during the narrative part of the report, particularly by the statements that I have rer l to you? A. Yes.

Q. Wouldn't the weighting of those figures by the statements that I read indicate that this company was in a precarious financial condition? A. No, sir.

Q. And an unsound financial condition? A. No. The statement shows a capital of $129,600. Doesn't show insolvency. There is no indication it ever was insolvent. There is no indication that the company—

Q. I didn't use the word insolvency. You used the word insolvency. I said, precarious financial condition. A. I don't think this company would be considered in a precarious condition or position on the basis of this statement.

Q. You read this paper, I take it, studied it carefully? A. Yes, sir.

Q. This paper which has been loosely referred to (341) as a prospectus, Plaintiff's Exhibit 357? A. Yes, your Honor.

Q. And you have studied these figures pretty carefully from the standpoint of a Certified Public Accountant. You were aware, I take it, as a result of your study that this was a franchise air carrier which needed to maintain operation in order to maintain its franchise, is that right? A. Yes, sir.

Q. You realize in the statements on the face of this report that it had actually discontinued its scheduled operations and that its franchise was in jeopardy, is that right? A. Yes, sir.

Q. You understood, further, that the sale of its equipment, these two DC-4 aircraft, was actually used for the purpose of paying outstanding debts, is that right? A. Yes, sir.

Q. Wouldn't you agree, therefore, that this so-called prospectus showed on its face two things, that this company was in imminent danger of losing its franchise for failure to continue scheduled operations and that it was not in good financial condition but was (342) in precarious financial condition? In other words, that it was in an unsound financial condition. By that I mean, without sufficient capital, without sufficient reserve of operating funds to maintain efficient operation, according to the franchise agreements. Wouldn't you agree that that was so from the statements appearing on the face of the so-called prospectus? A. I would agree to that, your Honor, with the exception that I hesitate to use the word "precarious" or "unsound."

The Court: I think I have defined what I mean by it. Would you accept my definition or would you care to amend it?

The Witness: I will accept your definition.

Q. Then would you agree that it was in such a condition as I have defined it? A. Yes, I agree. May I make the point, your Honor—

Q. Yes, if you wish to explain any answer you have given, go ahead. A. There is indication, as you mentioned, that there was a certain degree of unsoundness in the financial structure, that there was a loss sustained in 1951, but, in my opinion, where you have a three (343) months' operating loss in excess of a half a million dollars for a small company, an indication of a slight unsound operation is insufficient. The relative size of figures has some bearing on whether they should be disclosed or not. Where you have an enormous operating loss, I feel that it should be shown.

* * *

By Mr. Schoenwald:

Q. Is there anything in either the financial statement or in the text of the prospectus itself which shows that the company did not operate profitably during its period of operation? A. Would you repeat the question?

Q. What I am trying to distinguish is this: I am trying to distinguish between what I took to be the tenor of the Judge's questions dealing with the precarious situation of the company, if that be the case, and the experience of the company in operations, whether they earned money or did not earn money, and I say to you, is there anything in the prospectus, in the context or in the schedule on page 6, which suggests to a reader that the company lost money in the doing of (344) its business to any degree? A. No.

Q. Now, is the losing of what I think you have told us, the $500,000, during this period in a company which grosses, claims to have grossed about $1,700,000 over the larger part of this period a significant or substantial loss? A. Yes, extremely significant. The operation was, from a profitable standpoint—from the standpoint of profit was

extremely unsound. The expenses were far in excess of its income for a considerable period of time.

Q. You found nothing here that would reveal that? A. No, sir.

Cross Examination by Mr. Nickerson:

Q. Mr. Schindall, did you make any notes, working papers? A. Yes, sir.

Q. On which you based your testimony? May I see them, please.

(345) Mr. Nickerson: May I have it marked for identification, your Honor?

The Court: Yes.

(Marked Defendant's Exhibit BS for identification.)

Q. Mr. Schindall, do you have a list any place of the records that you used in preparing yourself for your testimony? A. I have no formal list, no.

Q. Can you tell me—

Mr. Nickerson: I would like to have produced all records, which are in the plaintiff's possession, all records on which Mr. Schindall based his testimony.

Mr. Schoenwald: If your Honor pleases, many of these records were in his custody.

Mr. Nickerson: I am asking for the ones (346) in your custody.

Mr. Schoenwald: Those are quite voluminous, spread throughout this paper—how many cartons? There is nothing I can hand to you immediately.

Mr. Nickerson: May we have that done at the recess?

The Court: Yes, either at the recess or end of the day, the statements to be made available to you of their accountant.

Q. In figuring the profit on the sale of the airplanes, Mr. Schindall, what figure did you take as the sales price? A. Net $900,000.

Q. Now, with respect to the— A. I say net because there was a commission paid. Actually, almost a million dollars was received but almost $100,000 was paid out in commissions.

Q. Right. With respect to the figure which you have testified to as to operating, gross operating revenue for 1950, I believe in the neighborhood of a million seven hundred thousand dollars, did you find that that was, indeed, put on the books in 1950? A. Yes, sir, it was.

Q. As I understood your testimony, you say (347) that certain accounts receivable were written off after 1950, after December, 1950, and prior to June 15, 1951, is that correct? A. That is correct.

Q. Can you tell us which ones, which accounts those were, that were written off? A. I can—

Q. Do you have some record that will help you? A. I can tell you some.

Q. Will you tell us? A. May I have my notes?

Q. Yes. A. There were several types of accounts receivable. One was an account called due from National Division.

Q. How much was that? A. Amounted to $23,584 at December 31, 1950.

Q. That was written off? A. Yes, that was written off to uncollectible accounts on March 31, 1951.

Q. What record is that uncollectible accounts in, do you recall? A. Well, that is in the general ledger, I suppose, also in the journal comprobane No. 122 prepared by J. M.

(348) Q. Go ahead, will you tell us the other accounts receivable that were written off? A. Well, there were $125,000 out of the Spanish accounts receivable.

Q. Is that— A. Written off.

Q. Is that $126,315, which appears on page 6? A. That is correct.

Q. Of Defendant's Exhibit 356. What else? Do you have another sheet now that you are refreshing your recollection from? A. Yes.

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Q. Go ahead. A. There were accounts receivable from employees to the extent of $73,000 which existed at April 30, 1951, but no longer existed at June 15th, according to the balance sheet. We have a gap between April 30th and June 15th so that—

Q. April 30, 1951? A. Yes. The books—

(349) Q. So you don't know? A. The regular books of account stop at that point.

Q. You don't know what happened between April 30th and June 15, 1951, is that right? A. Well, we know that the accounts receivable no longer exists, according to the balance sheet, so they must have—

Q. That you get from the statement of estimated assets and liabilities on page 6 of Exhibit 357? A. That is correct.

Q. What else, what other accounts receivable were there? A. I couldn't tell you specifically but they were about $600,000—

Q. I am asking about specific. Can you trace specific accounts receivable that were written off? A. Not at this point, no, sir.

Mr. Nickerson: May I have these notes marked, your Honor, for identification?

The Court: Yes.

(Marked Defendant's Exhibit BT for identification.)

(350) Q. Do you have any other notes that you use in testifying or in preparing for your testimony? A. Well, I have a lot of work sheets.

Mr. Nickerson: May I have those marked, your Honor, for identification?

The Witness: They are rather voluminous and disorganized.

The Court: If they weren't used by the witness during his testimony to refresh his recollection, I don't think that they should be marked.

Mr. Nickerson: May I ask the question then?

The Court: Yes.

Mr. Shoenwald: I think the witness indicated by raising his hand that he hadn't finished the answer before.

Q. I am sorry, did you not finish the answer? A. I don't think I did. I don't recall the question.

Q. Maybe some further question will refresh your recollection.

Mr. Schoenwald: May I refresh his recollection?

The Court: Surely.

Mr. Schoenwald: I think it was dealing with the question of other accounts receivable that (351) were written off or disappeared other than the two that you had mentioned. Was that what you wanted to add to?

The Witness: Yes, I wanted to say that out of $600,000 in the accounts receivable existing and on the record at April 30th, the planes were sold immediately thereafter and operations discontinued, then in a six weeks' period the $600,000 in accounts receivable become $125,000 in accounts receivable. There must have been large writeoffs. There couldn't have been collections because there is no corresponding rise in the cash account.

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(354) Q. Didn't they make sales tickets in 1951 in Spain? Didn't they put on their books pesetas in Spain in 1950?

(355) A. My recollection is that this account existed at $250,000 at the end of 1950 and that it remains about the same. There were no collections, since no funds could have been gotten out of Spain.

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(357) Mr. Schindall, if a person knew the amount at which the two DC-4s had been sold in May of 1951, and if he further knew what those planes were carried on the books as a purchase price, he would then know the amount of profit that had been made as a result of the sale of the airplanes, would he not?

Mr. Schoenwald: I am going to object to this line of questioning. I think counsel is trying to get to a hypothetical question for which there has been no foundation, and if an attempt, in fact, were (358) made to lay a foundation for such a question, I think it would be found wanting. Such state of facts cannot be demonstrated as proved.

The Court: No. I think it is proper cross-examination on the subject of the sale of these airplanes and the treatment of the resulting proceeds. I will allow it.

The Witness: May I have the question?

(Question read.)

A. Yes.

Q. And he would then know that there had been a non-operating profit, I think you called it, of—was it $500,000?

A. Yes.

Q. And he would then know as a result—if he examined page 6 of Plaintiff's Exhibit 357 and the item, loss, 1951, $62,000, he would then know that something had happened to absorb some $562,000, is that correct? A. Not necessarily. He may have—a person may figure that out or

he may not. In fact, it might take a trained accountant to make the connection and the inference.

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(359) JORGE MARCANO, resumed.

Direct Examination continued by Mr. Schoenwald:

Q. You will recall, Colonel, that I was asking you yesterday whether or not you knew the extent of the combined —of the operating loss during the combined (360) period from January, 1950, until the end of April, 1951, and I think you didn't know whether there was a loss at all, in fact I think you gave us the impression there was a profit, but you thought maybe something would help you to learn of it later.

Mr. Nickerson: No, your Honor. I object to the characterization of his testimony.

The Court: Yes, don't characterize.

Q. Can you tell us anything now—can you tell us now whether or not this company lost a half a million dollars, approximately, between January 1, 1950, and the end of April, 1951?

Mr. Nickerson: Your Honor, I don't think that he is competent to testify.

The Court: I think he may be competent.

Mr. Nickerson: We went all over this yesterday.

The Court: Connected with the operation of the company, and he may answer that very briefly by saying yes or no, and whatever the amount was, if it is a different amount.

A. I don't know if it lost a half a million dollars.

The Court: Do you know whether there was a (361) loss, and if so, what the approximate amount was during that period?

The Witness: I know that what is shown in the statement, sir.

The Court: So that your knowledge wouldn't go beyond what is set forth on page 6.

The Witness: Yes, sir.

The Court: Of the statement of the estimated assets and liabilities.

The Witness: And liabilities.

Q. Did you suggest to Gotch & Crawford, whom I understand you met with in the preparation of this prospectus, that they ought to include in its language something to warn people of the fact that this company was either in a precarious position or losing money?

Mr. Nickerson: I object to it. Your Honor, the study speaks for itself. They never—

The Court: He may answer that yes or no. Very close to being argumentative but I will allow it. You may answer it.

The Witness: May I have repeated the question?

(Question read.)

A. I gave them all the facts I had.

(362) Mr. Schoenwald: I move to have that answer stricken as not responsive.

The Court: Yes, it is responsive. He said he gave them all the facts he had.

Q. In any of the facts that you gave him did you tell him anything—or did you give them any instructions to advise them to include in the prospectus a notice or a

warning to people who were to read it and would utilize it that this company was either in a precarious position, it had lost half a million dollars, or any amount of money during 1950-1951?

Mr. Nickerson: Same objection.

The Court: Yes, sustained.

Colonel Marcano, is it fair to say that whatever is set forth in the so-called prospectus, Plaintiff's Exhibit 357, reflects the facts and figures given by you to this company that made the study?

The Witness: Yes, it does.

The Court: I think that settles that.

Mr. Schoenwald: I am sorry, I didn't hear his answer.

The Court: Put a question. I'll tell you later. You'll never get through with this case.

Q. When you asked for the—when you instructed (363) your attorney, which I assume you did, to ask for the airplanes and call the contract at an end, did you have in the company treasury a million dollars at that time to pay for the airplanes? A. When—

The Court: The question should be, did you have a million dollars in the treasury on or about, and give the date.

Mr. Nickerson: September 17, 1951.

Q. September 15, 1951. A. No, I did not.

Q. Did you have a bank credit for that money or letters of credit? A. I did not.

Q. Did you intend to pay for those airplanes at that time?

Mr. Nickerson: Your Honor, I object to his intent.

The Court: Overruled.

A. We had the airplanes sold. We had people who would have bought the airplanes if we had them at the time.

Q. You didn't intend then to use them in your business operations at all, to continue your business? (364) A. That was contingent to whatever happened.

Q. Your plan was not to use the airplanes then in the operation of your business but sell it to somebody else, is that right? A. That is what, the first move made.

Q. Do you have any documents here with you or other papers indicating that you had somebody ready to purchase those airplanes at that time?

Mr. Nickerson: No, we have not, not that I know of.

A. We don't have it.

Q. Colonel, can you tell us whether or not the statement of Mr. Schindall to the effect that that $1,717,000 included about $19,000 of income which was not the result—I am sorry—included some $69,000 which was not the result of your international operations is correct? A. I would have to go over my books to answer that question.

Q. Doesn't that sound approximately correct to you, sir? A. I wouldn't want to compromise that answer because I am not aware of the fact.

Q. Colonel, is it a fact that the time this (365) prospectus was prepared that you had about 53 per cent of the shares of this company? A. About?

Q. That is right, or exactly 53 per cent of the shares of this company? A. No, I had much more than that.

Q. How many shares did you have in the company at the time of the signing of the contract or the preparation of the prospectus? A. I had approximately 92, 93 per cent of the stock.

Q. Can you—do you have with you any indication that that is the number of shares that you held? Do you have any papers here with you to show that? A. I think we have some papers that would show that.

Mr. Schoenwald: Could you produce any papers?

Mr. Nickerson: I cannot. Perhaps—did you have one? I cannot put my finger on it. Do you have one?

Q. When you met with Gotch and Crawford did you tell them that your share holdings at that time were 53 per cent of the shares of the company?

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(367) Do you concede, Mr. Nickerson, that the franchise contemplated that ownership of shares had to be in Venezuelans—Venezuelan hands—to the extent of at least 50 per cent?

Mr. Nickerson: 50 per cent, I believe that is right.

Mr. Schoenwald: Or 55 per cent?

(368) Mr. Nickerson: 51 per cent.

The Witness: 51 per cent.

Mr. Nickerson: 51 per cent is right but I certainly don't concede—

The Court: Subject to correction, then, I will assume that the parties agree that under the provisions of the franchise that 51 per cent of the stock ownership had to be in Venezuelan hands.

Mr. Nickerson: Yes. It is not, if I might make just a slight correction, it is not under the franchise. That is under the Venezuelan law. The provision he is referring to in the franchise has nothing whatever to do with this and the provision relating to transfer to foreign companies has nothing whatever

to do with this, and I certainly don't concede that point at all.

Mr. Schoenwald: It might only be a matter—

The Court: Is it your contention, Mr. Nickerson, that the shares of this company in excess of 51 per cent could be transferred to non-Venezuelans?

Mr. Nickerson: No; 51 per cent under Venezuelan law, not under the franchise, but under the general Venezuelan law.

The Court: 51 per cent had to remain—

(369) Mr. Nickerson: In Venezuelan hands.

The Court: Under Venezuelan law in Venezuelan hands?

Mr. Nickerson: Correct.

The Court: Is it your contention that 49 per cent could, under Venezuelan law, be transferred to non-Venezuelan holders?

Mr. Nickerson: Yes, your Honor.

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(370) Mr. Schoenwald: I say there are two translations, there is the one that I place before your Honor, which is a translation we have prepared, and a translation which has been provided by the defendants, and you might find very slight differences in language.

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(371) The Court: I am sufficiently familiar with Spanish to be able to rule on this particular translation and I am satisfied that the translation appearing on the form of the Lawyers and Merchants Translation Bureau is accurate.

Mr. Schoenwald: That is the one we submitted.

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The Court: It says very clearly that the contractor may transfer and assign the rights and

obligations appearing in the contract after prior approval of the Ministry of Communications only to a Venezuelan corporation, so forth.

Mr. Nickerson: Right.

The Court: I fail to see the relevance of that provision to this option provision. It has (372) nothing to do with it.

Mr. Schoenwald: If your Honor pleases—

The Court: What the Venezuelan law requires a franchise holder to do with respect to his rights and obligations under a franchise has nothing to do with the provision of this option agreement.

Mr. Schoenwald: If your Honor pleases, I am going to introduce an expert witness in this Venezuelan law in order to clarify what that clause means, and this witness assures me there isn't any question but what the reference to the participation in the company refers to participation in ownership.

The Court: All right; that is a question of fact which you have the burden of establishing through an expert witness if you can do it. We haven't reached that point yet. I would like to get through with the testimony as quickly as possible. I am deeply unhappy about the manner in which we are plodding through this testimony. I think you could ask concise, short questions, and that we could get over this.

Mr. Schoenwald: If your Honor pleases, it may be that the proof on this point will be a cumulative matter, and it may be proved out of minutia, (373) and I did my best in order to make this more expeditious this morning, but better I cannot do.

The Court: I cannot ask you to do more than your best. That is all I can ask you to do. Go ahead.

* * *

Mr. Schoenwald: I have asked the witness whether or not he recalls advising Mr. Gotch of Gotch and Crawford that his shares as of the date that the prospectus was prepared, early in June, were 53 per cent of all the shares issued and outstanding.

The Witness: I may have told him. I don't (374) remember exactly.

Q. Was that not the fact at about that time you had 53 per cent of the shares? A. I don't recall actually what proportion I had at that time.

Q. Was it pretty close to that? A. I concede it was pretty close to that.

Q. That included the shares, did it not—

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(375) By the Court:

Q. At the time of the execution of this contract, Colonel Marcano, how many shares of stock in CAVE did you own? A. I owned at that time about 580 shares or 600.

Q. What percentage of the total of the shares of outstanding stock did that represent? (376) A. It represented about 94, 95 per cent, your Honor. I cannot figure it out right now, but over 90 per cent.

Q. So that you had most of the shares of CAVE at the time this contract was entered into? A. Yes, your Honor.

Q. Did you continue to hold those shares as owner— A. Yes, sir.

Q. —until September? A. Yes, your Honor.

Q. And through the month of September, 1951? A. Yes, your Honor.

Q. Your stock ownership didn't change? A. No, sir.

Q. During that period from the end of July until the end of September, 1951? A. No, sir.

Mr. Schoenwald: If your Honor pleases, I think by cross-examination of this witness I am going to demonstrate that those were not the facts.

By Mr. Schoenwald:

Q. Did you acquire any shares between the time you spoke to Gotch and Crawford, when they prepared (377) this prospectus in June, and the date of the signing of the contract in July?

The Court: I won't let you inquire into that. The relevant period, if it is relevant at all, is the time the contract was entered into and the time the option could have been but wasn't exercised. You cannot possibly go into any other period.

Mr. Schoenwald: If your Honor please—

The Court: We are not going to explore the history of this company and we are not going to go into June. As of the time he signed this contract, he made a representation. That is the crucial period of time and, as of that period, you may inquire, and as of September you may inquire, and I have serious doubts as to the weight of that testimony, but I will let you do it for the time being.

Mr. Schoenwald: If your Honor pleases, I propose to prove as of June, only a few weeks before July, he had acquired all the shares he could possibly acquire, and he told these people who prepared the prospectus that he had gone out and acquired all these shares. If the Colonel can tell us what shares he acquired in the interim, I will then be able to test the accuracy of that statement because I understand (378) that the Colonel's answer will be that he acquired the shares of the particular company. Then I will be in a position to prove that he

didn't acquire the shares of that particular company by putting in evidence, but unless I can develop historically what he had at a given point and trace the sequence through, I am in no position to attack his statement that he did have the shares.

The Court: Ask him as of July, 1951, what—

Mr. Schoenwald: I have to first start with June.

The Court: (Continuing)—what the history of his acquisitions was. You have to be as concise as possible about this.

Q. Did you acquire any shares between the time you spoke to Gotch and Crawford, when this was prepared, and the date you signed the contract? A. Yes.

Q. What shares did you acquire? A. I don't remember the number. I would have to refresh my recollection.

Q. Any large block of shares? A. No. I acquired a few shares from share holders.

(379) Q. Did you acquire more than five per cent of the shares? A. Yes.

Q. What percentage of the shares did you acquire between June and July? A. I will say I recall about 25 or 30 per cent. I don't remember exactly.

Q. Where was this 25 or 30 per cent acquired? A. They were acquired through many Venezuelans who held them.

Q. Have you any evidence here to indicate you acquired those shares? A. There might be some evidence.

Mr. Schoenwald: Would you try, during the recess, to look for any evidence that the Colonel held that many shares as of July or acquired 25—

Mr. Nickerson: He already testified to it.

The Court: Yes. If this is a matter—

Mr. Nickerson: If he said something inconsistent maybe you could show it.

The Court: This is a matter you could have developed on pre-trial examination.

Mr. Schoenwald: If your Honor pleases, we have asked the Colonel repeatedly how many shares (380) he held and his answers have varied from time to time. Now we have the statement that at the time the prospectus was prepared, in which he said he had a majority of shares, and it was closely held, he had been telling the persons who prepared it that he had only 53 per cent of the shares.

Q. Colonel, isn't it a fact that between the preparation—between the time of the preparation of this prospectus and the signing of the contract that you gave away some of your shares? A. That I gave away some of my shares?

Q. Did you give some of your shares to somebody, that you reduced your share holdings? A. I made a transfer of shares.

Q. So you had less shares than you had before you made the transfer, isn't that right? A. Of course.

Q. Who did you give the shares away to? A. I sold some share to Mrs. Marshall.

Q. What was the consideration for selling these shares to Mrs. Marshall?

* * *

The Court: I will let him answer.

(381) A. Consideration for some money I owed her.

Q. You owed Mrs. Marshall money? A. I owed Mr. Marshall money and I paid him and I paid him with shares.

Q. Was the money you owed him for getting USOA to sign the contract? A. No.

Q. Was that the money? A. No.

Q. What was the money you owed her for? A. For services.

Mr. Nickerson: I object.

The Court: Sustained. Consideration of services. That is enough. I am not going to explore that matter.

Q. Colonel, isn't it a fact there was a lien on over 150 of the shares that you held?

* * *

Q. Is it not a fact that the shares which you had attempted to acquire from the Flying Tigers to the number of approximately 150 shares weren't paid for (382) by you—

Mr. Nickerson: I object to the form of the question.

Mr. Schoenwald: I thought the Judge asked me to state all the facts.

The Court: Yes.

Q. (Continuing) That weren't paid for by you and that there was an agreement between you and the Flying Tigers that if you didn't pay for them that some time around June, I think, of 1951, or at some date before the signing of the contract, that they were in a position to automatically reclaim these shares, and that they sent you several letters asking you to either pay for them or to redeliver the shares, and that your counsel advised you that you had to pay for them because by this time you were already in default inasmuch as you were unable to deliver the shares to USOA if they called upon you to do so.

Mr. Nickerson: I object to all this. It is in the document I am producing. It is all merged in the document.

Mr. Schoenwald: I thought I was examining this witness at this time.

Mr. Nickerson: And I am objecting to the (383) question on the ground that it is merged—all prior negotiations are merged into the document.

The Court: What documents are you talking about?

Mr. Nickerson: Contract with the Flying Tigers.

The Court: I sustain objection as to the form of your last question. Apparently we will never get through.

Mr. Nickerson: I produce a document—

By the Court:—

Q. Colonel Marcano, when you told me that you owned over 90 per cent of the shares of this company in July and you continued to own over 90 per cent in September did you include a number of shares that had previously belonged to the Flying Tigers? A. Yes, sir.

Q. Were those shares your absolute property or were they in any way contingent upon rights to be exercised by the Flying Tigers? A. Upon money to be paid, your Honor.

Q. What percentage of all these shares were represented by these so-called Flying Tigers shares? A. It was 22-½ per cent, I think.

(384) Q. 22½ per cent? A. I think it was, that was the percentage.

Q. So, assuming that, you owned the difference between the 90 some per cent and the amount by which that would be reduced by Flying Tigers' shares, your absolute right? A. Yes.

Q. In other words, over 70 per cent were your actual property? A. Yes, sir.

Q. And about 22 per cent would be the Flying Tiger shares? A. Yes.

The Court: Let me see the documents.

Mr. Nickerson: This is the settlement with the Tigers.

Mr. Schoenwald: If your Honor pleases, I believe that document post-dates the contract between the parties, if it is the paper I believe it to be.

The Court: Yes. Take a look at it. It seems to me that sets forth the situation.

Mr. Schoenwald: If your Honor please, I have no objection to its being included in evidence but I do object to its being offered on the point of (385) merging the transactions with defendant so far as I am concerned. The doctrine of merger might apply to an action between Flying Tigers and the Colonel but it doesn't apply to me on the cross-examination of this witness.

The Court: Every trial should be a conscientious search for the truth and not a meandering into possibilities and speculations, and I have got to stop this endless exploration into irrelevant minutia, if we have a better way of seeing what the facts were. The witness has testified these so-called Flying Tiger shares were not his absolutely property. He has also testified that he owned over 70 per cent without these shares.

To the extent that his failure to have absolute control of these shares or absolute ownership of these shares has any relevance, and I doubt it has, wouldn't that be sufficiently explained by these papers? Can't you use these as the basis for any further questioning?

Mr. Schoenwald: I think that paper can be used and the next paper, I think, can be used, if your Honor please.

Mr. Nickerson: May we have this in evidence, (386) your Honor?

The Court: Yes. Any objection to putting these in evidence?

Mr. Schoenwald: No, I have no objection to putting that in evidence.

(Marked Defendant's Exhibit BU in evidence.)

Q. I wonder, Colonel, if you can tell me whether or not you have seen this letter? A. Yes, I have seen this letter.
Q. That was sent to you by Mr. Marshall, wasn't it? A. What date is this? November 11, 1951.

Mr. Nickerson: I object to it. It is after they started the lawsuit. I don't know how they got it. Inadvertently I must have let them have one of Mr. Marshall's letters. I object to it.

Mr. Schoenwald: I offer that letter in evidence and call your Honor's attention to the mark which I put upon it to attract attention to the fact—

The Court: Was this after the lawsuit began?

Mr. Nickerson: A month after.

Mr. Schoenwald: Your Honor, this is offered as an admission by the defendant.

Mr. Nickerson: It is also a privileged communication.

(387) Mr. Schoenwald: I think that we have evidence in the record, your Honor, that, as a matter of fact it is admitted in the pleadings, that John Marshall was participating here as an attorney-in-fact for the purpose of many negotiations and this

was no area for consultation between attorney and client. This was between agent and principal.

Mr. Nickerson: Your Honor, I am not even going to comment on that.

The Court: I sustain the objection on the ground that it is irrelevant and not an admission. You may mark it for identification.

(Marked Plaintiff's Exhibit 226 for identification.)

The Court: It was written after the parties had ended their relationship and after the contract in question terminated by virtue of the various circumstances, and it was after there was any possibility of the exercise of any option. I do not regard it as an admission. So it is therefore ruled out.

Mr. Schoenwald: I would like to just read a sentence in for proof, if your Honor pleases.

The Court: No, I have read the whole exhibit, and it is marked for identification. So you (388) have your automatic exception to my ruling.

Mr. Schoenwald: I think I would like to clarify the state of the record. The witness has told us that he had at most 72 per cent of the shares, as to which there was a lien on some 25 per cent of the shares.

The Witness: That is what I say, yes. I said approximate percentage of 72.

Mr. Schoenwald: I respectfully suggest that if the witness can do anything to make those facts more accurate between now and the time this case is terminated, it would be useful, because I think this bears on the fraudulent representations.

The Witness: I will.

Q. Colonel, isn't it a fact that at the very time the propectus wa. being prepared and at the very time you were negotiating this contract, and even on the day that the contract was being signed, that the last person that you contracted with of a similar nature, the Near East Air Transport, who provided you with your last airplane, was suing you for $60,000?

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(389) The Court: You may answer whether as of June 15, 1951, there was a pending claim against you or your company.

The Witness: There was a claim against me, I think it was. I don't remember the date exactly, but there was some.

The Court: What amount?

The Witness: In around $60,000.

Q. As a matter of fact, wasn't the bank account of the company in New York attached at that time by the Sheriff? (390) A. Yes.

Q. And, as a matter of fact, didn't you openly enter into a settlement to pay off at least $30,000 of this claim? A. Yes.

Q. Wasn't the claim in fact against the company?

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Q. Isn't it a fact that you actually paid this company at least half of their claims afterwards? A. Yes.

Q. Isn't it a fact that you never mentioned this to USOA, that you were sued by your last source of airplanes? A. No, I didn't mention it.

Q. Isn't it a fact that the office which you had in Rome, which you described as the office being near TWA and in a very attractive location to them was given by you—given by your corporation to Mr. (391) Wooten of Near

East Air Transport as part of a settlement of this claim against you so that the very office which you described in the prospectus and the facilities you described in the prospectus having in Rome had been transferred by you to Mr. Wooten before the contract was signed? A. No.

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Q. I show you this Exhibit 216 for identification and ask you does that refresh your recollection as to whether or not by March of 1951 you had already transferred your office facilities in Italy to Mr.—that is, AVE or CAVE did transfer its office facilities in Italy to Mr. Wooten, being the same office facilities (392) as described in the prospectus. A. This was refused by Mr. Wooten.

Q. Do you have with you a document showing his refutation of that? A. Yes.

Q. Today? A. Yes.

Q. Isn't it a fact that the Flying Tigers were also claiming about $30,000 from your company at this same time, June and July, when the contract was signed and that you didn't mention this in the prospectus or tell AVE about it? A. They weren't claiming anything against my company.

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Q. I show you Defendant's Exhibit BA and direct your attention to the part of it which provides for a release of CAVE and I ask you if that refreshes your recollection as to whether or not the Flying Tigers and you were attempting to negotiate a release of CAVE for some $30,000 liabilities also not reported in the prospectus? (393) A. The reference to CAVE is what I took upon myself after buying the shares from the Tigers, to pay for those moneys, and they didn't—they, sometimes, they billed me, sometimes they billed CAVE. So when the release was signed I wanted to include CAVE so they wouldn't bill CAVE any more and there wouldn't be any confusion.

Q. You had had a release from CAVE before that, did you? The Flying Tigers didn't give you a release on this $30,000 with debts? As a matter of fact, you haven't got it yet, have you? A. It is right here.

Q. When did you receive this? A. It is dated, isn't it?

Q. Did you receive that at the date? A. Yes.

Q. As a matter of fact weren't they asking for this money long after this date? A. Not long after the date. I don't remember exactly what date I received it but it was around a date here.

Q. You had no release of CAVE before August 14, 1951, did you, from the Flying Tigers? A. Yes, there is a document in which I assumed (394) obligation for CAVE and they accepted it so.

Q. Do you have a document which will show where CAVE was released before you signed the contract? As a matter of fact, you also owed some eight or ten thousand dollars in Portugal which wasn't reported in the prospectus as being among the $54,000 of liabilities mentioned there, isn't that right? A. No.

Mr. Nickerson: May I just make this general objection so I will preserve my record? The contract states that USOA is to have no interest whatsoever in the tangible assets of the company at the time they exercise their option if they do exercise it. So that all this, I contend, all this is irrelevant. The contract provides for segregation of those assets and those liabilities so they wouldn't get any part whatsoever of that. For that reason I object to all these questions.

The Court: I note your objection but I understand that the sole purpose of this questioning by Mr. Schoenwald is an endeavor to establish that as of the time the contract was entered into CAVE

was not in a position to promise a one-year option to buy 25 per cent of the total shares of the outstanding (395) stock of CAVE.

Mr. Nickerson: If that is what it is directed to, it is relevant.

Mr. Schoenwald: In addition, your Honor, it is intended to show that the statements contained in the prospectus purporting to describe the previous experience of the company as well as its present position to a person with whom AVE could contract, based on its soundness or lack of soundness, were conscientiously misstated, inasmuch as the $54,000 worth of liabilities mentioned on page 6 has been testified to by the Colonel, I believe, as not to include the $60,000 he was sued for by Flying Tigers and not to include—by Near East and not to include the claim of Flying Tigers. So that instead of $54,000 being the figure, the figure should have been approximately $120,000.

The Court: Yes. Well, you heard him testify that the suit was against him personally, and this was an estimate of AVE's, all liabilities of AVE's. I don't understand why a personal suit must be revealed as part of the assets or liabilities of a company, and you have already argued the release point and it has been answered.

(396) Mr. Schoenwald: If your Honor pleases, I wasn't aware that the Colonel was still continuing to claim the suit was against him personally. I therefore offer in evidence a transcript of a suit by Near East Air Transport Incorporated against CAVE in which the Colonel is not mentioned, under the seal of the County Clerk's office, County of New York.

Mr. Nickerson: I object to it, being a subsequent document.

Mr. Schoenwald: I draw to your attention the fact that the Colonel is not named as a defendant, that only the company is named.

The Court: This would seem to indicate that the suit was against CAVE, and it is notarized on June 29, 1951.

Colonel Marcano, I wish to ask you whether this photostat of the New York State Supreme Court action, Near East Transport against CAVE, is the suit based on the claim that you have just testified to?

The Witness: Yes, sir.

The Court: You note that the defendant is the company and not yourself. Does that refresh your recollection as to whether the claim was asserted against you or against the company?

(397) The Witness: It refreshes my recollection that it was against the company but the company —what I intended to say, your Honor, was that the company didn't owe any money to Near East Transport on that.

The Court: I understand that, you said that, but the fact is, is it not, that the claim, whether it was a valid claim or not, was asserted against CAVE?

The Witness: Yes, sir, against CAVE.

The Court: And not against you?

The Witness: That is right.

Q. It was the company's funds that were attached, not your funds which were attached, is that correct? A. Yes.

Q In the settlement of that debt you used the company's office in Rome to pay it, didn't you, not your personal office in Rome? A. Yes.

(398) (Marked Plaintiff's Exhibit 90 in evidence.)

Q. As a matter of fact, it was shortly after you received this suit and before you signed the contract, was it not, that you said, "Well, we will offer in settlement that office in Rome," isn't that right? A. I don't recall exactly the date.

Q. It was pursuant to this suit in July that you gave them that office in Rome? A. It was before the signing of the contract.

Q. It was before the signing of the contract that you gave away the office in Rome?

Mr. Nickerson: That isn't what he said.

A. I am not sure about the date.

Mr. Nickerson: All in this document.

Q. You think it may have been before? A. I don't know. I cannot compromise myself on the date.

Q. But you aren't sure it was after you signed the contract? A. I said I am not sure what date it was.

Q. Can you say with certainty that you offered to give away the office in Rome before you signed the contract?

(399) A. I am sorry, I cannot remember.

* * *

(400) Q. I show you this paper marked Plaintiffs' Exhibit 227 for identification and ask you to tell me what that paper is. A. This, apparently—it has no signature—it apparently is a letter directed to me from—it is initialed JM, August 1st.

Mr. Nickerson: I will concede that it is a letter from John Marshall to Colonel Marcano.

The Court: What is the date of that?
The Witness: August 1st.
Mr. Nickerson: August 1st.

A. (Continuing) 1951.

Q. Then, Colonel, do you remember receiving this letter? A. I haven't read the letter; I must have received it.

Q. You had received the letter? (401) A. I haven't read the letter.

Q. Oh, I am sorry.

Mr. Nickerson: We will concede that he received it, your Honor. It is in our—

The Court: Yes, it is part of the pre-trial order, and it is conceded that it was received within a reasonable time after its date.

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(402) (Plaintiff's Exhibit 227 for identification received in evidence.)

The Court: Put your next question.

Q. Now, Colonel, isn't it a fact that you regarded Mr. Cox and the Airlines with which he was connected as being in the nature of a partnership with yourself and with CAVE?

Mr. Nickerson: I object to that.
The Court: Yes. Sustained.

Q. Did you not in fact tell Mr. Cox and the other officers of U. S. Overseas Airlines that you would behave toward them as if you were their partner? A. I never told him any such thing.

Q. Didn't you as a matter of fact tell other people connected with U. S. Overseas and outsiders whom you went to for help that Mr. Cox was your partner? A. I do not recall ever referring to Mr. Cox (403) as my partner.

Q. It isn't even possible that you referred to him as your partner, is that right?

Mr. Nickerson: I object to what is possible.

The Court: Yes. Objection sustained.

Mr. Schoenwald: I would like to have some expression of certainty with which the witness holds this opinion.

The Court: His expression of an opinion isn't binding. You are asking him for his recollection as to what he said and that is as far as he can go. The nature of the relationship is a conclusion to be arrived at upon the relevant facts before me.

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(Plaintiff's Exhibit 272 for identification received in evidence.)

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(404) Q. Does this refresh your recollection as to whether or not you refer to Mr. Cox and U. S. Overseas Airlines as your partner?

• • •

A. Yes, I wrote it.

(Plaintiff's Exhibit 266 for identification received in evidence.)

Q. Now, Colonel, do you have a copy of the prospectus there before you?

• • •

Q. Now, would you look at page 15 of the prospectus? I direct your attention there to the reference as to the fares which your company charged. Do you see any reference there? (405) A. Yes.

Q. Now what does it say about the fares—I won't ask you what it says. But I show you this paper dealing with the fares of the company and ask you to tell me what it is. A. Yes. That is—

Q. Is that an announcement of the fares of the company? A. Yes.

Q. That was issued by your company? A. It was, yes.

Q. Do you recollect any change in the issuance of this memorandum as to what the fares of your company were? A. Yes. It ranged from 385 to 330.

Q. Are you reading from the prospectus, which is now in evidence? A. From both; yes.

* * *

(406) (Marked Plaintiff's Exhibit 388 in evidence.)

Q. Colonel, now I was asking you a little earlier about the problem of your having money to pay for these airplanes and I would like to read from your own testimony on the deposition before trial and ask you whether or not this refreshes your recollection with respect to that matter. Reading from page 569 of your deposition:

"Q. On September 17 or prior to September 17, 1951 had CAVE made any arrangements with any lending institution by which it had obtained credit in the sum of or in the vicinity of one million dollars?

"Mr. Nickerson: What was the date?

"Mr. Halpert: September 17, 1951."

Mr. Schoenwald: For the record, your Honor, Mr. Halpert was an attorney associated with the

plaintiff at that time and was previously attorney of record of the plaintiff.

Q. (Continuing) "As of that date?

"Mr. Halpert: Yes.

(407) "What do you mean, lending institution?

"Any person or company, let us put it that way, from whom it had credit.

"An established credit?

"Mr. Halpert: Yes.

"In the vicinity of a million dollars, no."

Next question.

Mr. Nickerson: The answer "no".

Mr. Schoenwald: Right.

"Q. On or about September 17, 1951, did it have any agreement with any person or company whereby it could obtain a million dollars or a sum in that general amount or a sum generally in that amount?

"Not that I know of.

"Had CAVE made any preliminary inquiries or arrangements prior to or up through September 17, 1951 to obtain a sum in the vicinity of a million dollars for its use?

"No.

"Had CAVE entered into any discussions or negotiations with any person or company up to or through September 17, 1951, whereby it would be enabled to obtain a sum in the vicinity of a million dollars for its use?

(408) "No.

"Now without going through these questions specifically one by one if it is all right with Mr. Nickerson to sort of cut this short, subsequent to September 17, 1951, would your answers be the same?

"Yes."

Mr. Schoenwald: Now I call upon the defendants to produce competent admissible evidence of their traffic rights in the various route countries described in the prospectus as of the period of the contract and as of the time during which the ocntract was to be performed.

I want to make clear that I am not asking you for your traffic rights of an earlier time or of a time prior to the execution of the contract between these parties. I particularly caution you in producing this, if you please, against hearsay evidence which you have previously proffered in the guise of evidence of your rights under this contract.

Mr. Nickerson: They are produced (handing).

Mr. Schoenwald: Now I would like to direct to Mr. Nickerson again: You recall, Mr. Nickerson, that we made not less than ten requests during the course of the depositions over five (409) years for these papers and you promised a continuous production and hadn't produced them until this time.

Mr. Nickerson: I got them from the files of the Venezuelan Ministry. I did not have them in my files.

Mr. Schoenwald: You promised to obtain them.

The Court: What is the purpose of this? It seems to me it is entirely useless. The papers have been produced, and that is all that matters.

Mr. Schoenwald: All right. I want to examine these before I offer them. It is going to take a certain amount of time. And I will hand them to the expert on that, in that matter.

The Court: One of the things I asked you to do, and that is why I prepared this little memorandum for the guidance of trial attorneys, was to read and

study all the papers that you were going to ask each other to produce in advance of the court session so that we would not be losing all this time waiting for you to study them during the court session. It is something that could have been done before, it seems to me.

Mr. Nickerson: That is my fault, your (410) Honor. I did not know that this would be an issue.

The Court: All right. Try to avoid it the next time.

By Mr. Schoenwald:

Q. Now I show you this paper, quite apart from the seal which you can look at, and ask you if you can tell me what it is? A. Yes. This is the National Gazette of Venezuela.

Q. Is that a copy of the issue of the National Gazette of Venezuela in which the issuance of your franchise was published? A. I have to look at it, sir. Yes, it is. The concession—

Mr. Nickerson: Wait.

Q. You said "Yes, it is"? A. (Referring to paper.) Yes, it is.

Q. Now does that refresh your recollection with respect to the question as to whether or not it is the practice and the requirement to publish in the Venezuelan Gazette Officiale any changes or modifications or issuances of official—of franchise and contracts of this character? A. Well, that is up to the Executive, because (411) the Gazette cannot hold all the documents of the Government of Venezuela. That is my understanding. I am sorry—I am not testifying on that as a fact, but it is my understanding.

Q. Do you have here with you any other edition of the Gazette or any other indication of the publication of an extension or modification or renewal of your franchise, if there was one? A. I do not.

Mr. Nickerson: We produced what we had, your Honor.

Q. Did you make any effort, did you search the Gazettes to find out if there was any republication of the extension of your franchise? A. I couldn't—I didn't find any in the Gazette.

Mr. Schoenwald: Would you concede that there was no publication in the official Gazette of Venezuela dealing with your company's renewal or modification of any franchise?

Mr. Nickerson: We can't concede that, your Honor. That is completely irrelevant.

Q. As a matter of fact, Colonel, did you not receive several communications from people advising (412) you that we were making efforts in Venezuela to obtain a copy of this Gazette and telling you that we were searching very much to obtain a copy of any reference to it in the official Gazette of Venezuela? A. Nobody asked me to.

Q. Did anybody tell you about our efforts in Venezuela to obtain—

Mr. Nickerson: I object to it.

The Court: Sustained.

Q. Colonel, isn't it a fact that this company in its past operations made attempts to use the activities of the officials of the government in procuring passengers? A. I do not understand you clearly.

Q. Isn't it a fact that to a large extent, or to some extent, the passengers that you had obtained in the year that you operated were obtained by your influence upon, financial or otherwise, officials of the Venezuela Government? A. I never had any financial influence with the officials of the Government of Venezuela. I had friends in the Government of Venezuela, and I still have.

Q. Did any employees of the company, to your (413) knowledge, carry on an active practice of paying for or otherwise compensating officials of the Government as a means of obtaining passengers for this airline? A. Not to my knowledge.

• • •

Q. The answer was what? A. Not to my knowledge.

Q. Now as a matter of fact you had an employee, your general agent, in Italy, a Sergio Tommassini, did you not? A. Yes.

Q. And, as a matter of fact, his father was the Venezuelan Consul? A. Yes.

Q. Consul in Italy, wasn't he? A. He was honorary Consul. He was an Italian citizen, honorary Consul for Venezuela in Italy.

Q. And that is the man mentioned in the letter of July 9th from Mr. Cover to you as the only person from whom they can expect to get visas in the future and this is the man whose son they will have to pay in order to get visas, is that right?

(414) Mr. Nickerson: I object.

The Court: Sustained. It is argumentative. It has reference to other evidence in the case and it is not a proper question in form and it is irrelevant. He should not be called upon to comment on other evidence; and you must reserve your argument on the evidence for a later point in the case.

Q. Is the Tommassini mentioned in the letter the same Tommassini who—as a matter of fact I believe both are mentioned—are the Tommassinis mentioned in that letter the father and son, one of whom is the Venezuelan Consul—

Mr. Nickerson: I object to it.

Q. (Continuing) —and the other of whom is an employee of your company? A. I haven't seen the letter and would like—

The Court: Let us not get into that.

Mr. Schoenwald: All right.

The Court: The only Tommassini he knows was the son. The father was honorary Consul. Haven't you sufficiently gilded the lily? Why do you have to now take out the exhibit to make absolutely certain that we are not dealing with a whole bunch of Tommassinis with pseudonyms.

(415) Q. Did you not receive reports from time to time by Mr. Cover that he found it necessary in the course of the regular business of this company to pay bribes or sums of money to government officials for the purpose of obtaining passengers? A. I did never—

Mr. Nickerson: Can we have the date?

Q. Well, did you not receive a report from him on or about June 1st—did you not receive an expense account from him covering the period June 1st, 1950 to the period February 28, 1951, the period I think described in the prospectus as their expense period, part of it, for bribes paid to government officials for getting passengers?

* * *

A. I never had any letter where they told me that they paid bribes to government officials for getting passengers.

Q. I show you this item 293 for identification (416) and ask you to read it and particularly draw your attention to the last page, to all the pages. Did you receive that paper? A. Yes, I did.

Mr. Schoenwald: I am going to ask that it be marked in evidence.

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(Plaintiff's Exhibit 293 for identification received in evidence.)

Q. Was this paper, Plaintiff's Exhibit 293, sent to you by Mr. Cover, who was manager of your office—was this paper sent to you by Mr. Cover, who was the person you adverted to as your office manager in Rome? A. It was sent to me by him, yes.

Mr. Schoenwald: Among other things, I draw your Honor's attention to the last page which I think purports to be a receipt for money paid to a consular employee for various—I think millions of lira in helping him to obtain passengers for the airline.

Q. Now is it not a fact that the reduction (417) in traffic after the departure of Dr. Savino from Italy back to Venezuela on December 22nd and the subsequent absence of the agregado was a factor inducing you to sell those airplanes? A. No.

Mr. Nickerson: He did not answer.

The Witness: I said "No."

Mr. Schoenwald: I believe in yesterday's testimony your Honor made some reservations with re-

spect to the introduction of documents dealing with Dr. Savino, and I would like to present those documents to you at this time perhaps with a comment upon them. For example, here is one (indicating).

Mr. Nickerson: Your Honor ruled those out yesterday; and I have the same objection, with the exception of 159 which I have no objection to. That is nearer the date.

The Court: It precedes the date by about two months, doesn't it? March, April?

Mr. Nickerson: February, isn't it?

The Court: No. It is March. Several months.

Mr. Nickerson: I have no objection to that one.

(418) The Court: All right. Mark that. And I adhere to the ruling I made yesterday.

(Plaintiff's Exhibit 159 for identification received in evidence.)

The Court: With respect to 121-A for identification I feel that, since it precedes the contract date by almost a year, it couldn't possibly bear any relevance.

Mr. Shoenwald: Here is another I should like to present to your Honor to rule upon.

Mr. Nickerson: What is the date?

Mr. Shoenwald: This is December 22nd, 1950.

I would like to be heard on the question of the relevance of the date. I propose that these documents would tend to show the following facts: 1, that—

The Court: I have read them. I don't want to hear your argument. I have read the documents.

Let me see the other document you are offering and I will see whether it justifies any claim of relevance.

(Mr. Shoenwald hands to the Court.)

(419) The Court: I saw this yesterday. 121-C was shown to me yesterday, was it not?

Mr. Schoenwald: I believe that it was. I thought that I was being asked to show you all of the documents.

The Court: Well, I see no reason for changing the ruling that I made yesterday. Both of these papers are dated December 22nd, 1950, and both of them deal with the same subject matter. One appears to be a copy of the other, as a matter of fact.

Mr. Schoenwald: I don't believe that I showed—

The Court: They precede the negotiations of the parties, they precede the contract of the parties by almost a year, and I consider them to be irrelevant.

Mr. Schoenwald: I would like to make a brief offer of proof with respect to them.

Mr. Nickerson: Can't we have them marked for identification, your Honor?

Mr. Schoenwald: I would like the record to indicate what I thought the utility of these documents was.

Mr. Nickerson: For all purposes he offers (419) them.

* * *

(421) Mr. Schoenwald: I think the document would tend to show that the defendants at all times knew, including the witness who has now testified, that Savino was a person of principal importance in the production of traffic for the defendant airline. It was shown that the witness feared his departure by reason of the fact that it would have an adverse effect on the procurement of passengers. The document would show that he did in fact depart and that it did have an adverse effect, which would relate to

the witness' previous testimony that—whatever evidence there may be in the record—that the number of passengers fell off when the airplanes were subsequently sold, or whatever evidence may be adduced in the record to—

The Court: The most compelling evidence in the world is that they lost operating revenue and sold their equipment. What more compelling evidence can you have than that?

Mr. Schoenwald: The equipment, according to the prospectus, was sold because they were having difficuties with parts, maintaining parts, difficulties with maintenance. The character of the prospectus is that this was a business which earned money, which (422) was successful, and remarkably successful in its first year, and because the difficulties bore no relationship to its operating matters it stopped doing business. The fact I think is that these papers will develop that the lack of success of this business wasn't due to non-operating considerations but to operating considerations.

The Court: I rule those out on the ground that they are too remote in time and substance to have any bearing upon the relationship of the parties to this contract; and on the further ground that to the extent that the presence or absence of Savino from his position in Rome has any bearing on the case, that has already been introduced into the record through the testimony of Colonel Marcano. We have it in already. So that the argument is available to you, regardless of what is in these letters.

By Mr. Schoenwald:

Q. Now, Colonel, will you tell us who Mr. Kniess was?
A: He was treasurer for some time.

Q. Was he a fairly responsible person? A. Yes, he was.

Q. Ordinarily, statements he made you came to (423) trust with a high degree of reliability? A. He was my treasurer.

Q. And you trusted his statements, did you not? A. Yes, I did.

The Court: How do you spell that?

Mr. Schoenwald: K-n-i-e-s-s.

I am going to offer this document in evidence as having come from the defendant's files.

Mr. Nickerson: We can concede that it came from our files. May I reserve a motion to strike?

The Court: Yes.

Mr. Schoenwald: On the grounds of relevancy?

Mr. Nickerson: On all grounds.

Mr. Schoenwald: I would like to hear some reasons for objecting to it so I am in a position to respond to it.

The Court: You will be given the right to respond. I am permitting him to reserve his objection and to make a motion to strike later. That is a matter that is up to me; it is for me to decide how the case is going to be handled.

(Plaintiff's Exhibit 384 for identification received in evidence.)

Mr. Schoenwald: There is a marked paragraph (424) there which I feel relates to the testimony of this witness yesterday that he had no role in attempting to influence the government to issue visas to passengers.

The Court: All right. Proceed, please.

By Mr. Schoenwald:

Q. Now, Colonel, had you received communications from government officials or employees of the company advising you of the activities of the company in utilizing government resources in obtaining passengers, other than the document that has already been introduced from Mr. Cover? A. Government resources?

Q. Well, government personnel, to help you get passengers. A. I wouldn't say that the government personnel helped me to get passengers. I would say that I had good relationship with the government agency, as a matter that would show cooperation with the company.

Q. As a matter of fact were you not carrying on active correspondence or communication with the Consul of Venezuela in Spain with regard to his preferring your agents in Spain so that they could get passengers because the government directed them there? (425) A. I have never asked them to do such a thing.

Q. But you received corespondence from him in which he told you of his great efforts in this connection, didn't he? A. I may have, yes.

Q. And did you instruct your agents to discontinue the practice of negotiating with the government official to get passengers? A. There were no negotiations employed there.

Q. When you received the communication that you mentioned having received from the Venezuelan Government official, did you get in touch with your agent and tell him that this wasn't the way in which you expected to carry on your business? Did you tell him to desist from any activities with the Venezuelan Government official in getting pasengers? A. No, I did not.

Q. Did you receive this—first of all, can you tell us who this letter is from? A. This letter is from Mr. Perez Arjona. He was Consul for Venezuela in Madrid.

Q. I would also like to ask you, Colonel, who Mr. Solinas was? A. Mr. Solinas was an employee of Fletamar, (426) our agents Fletamar.

Q. As a matter of fact was he not the president and sole employee of Fletamar, A. Oh no. He was an employee—

Q. Was he president? A. No.

Q. Was he the person who took care of most of the affairs of your company? A. Yes. He was in charge of that division of Fletamar.

Q. That is the same person adverted to in this letter? A. That is the same person, yes, sir.

Mr. Schoenwald: I would like to offer this exhibit.

Mr. Nickerson: I object to it. It is from the Consul in Spain. It is December 1950.

Mr. Schoenwald: This is a document addressed to the Colonel, dealing with the activities of the company.

The Court: I am sure that there are many documents addressed to the Colonel dealing with the activities of the company, but we have got to limit the extent of the proof to relevant times and relevant (427) matters. That is the problem that is confronting us..

Mr. Schoenwald: I think that its relevancy is demonstrated by reason of the fact that the prospectus in inviting the contract describes the period of 1950 as the base period from which observations can be made and it tells of certain events with regard to that period. Now the events that took place in that period were affected by various considerations, many of which we contend are important and were not reported in the prospectus. And this is one of the events which affected it and which

was not reported. The prospectus deals with the—

Mr. Nickerson: In order to cut it off may I withdraw my objection for the moment and reserve a motion to strike?

The Court: No. I have practically finished the reading of it, so I might as well go through the labor now.

I sustain the objection. It is irrelevant, it is prejudicial; it contains hearsay; it deprives the other side of possible cross-examination. And I don't think it has any probative value.

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Cross Examination by Mr. Nickerson:

(431) Q. Could you tell us what Mr. Waters' job (432) was when he was with you? A. First he was radio operator, then he was chief of communications with AVE.

Q. Was he familiar with the manifests of the company while he was with you? A. Yes, he was.

Q. Did he see manifests in the course of his duties? A. Yes.

Q. Do the manifests show the passengers? A. Yes, the manifests show the passengers.

Q. Did Mr. Waters make any trips over the route, of the AVE route, during the period he was with you? A. Yes, he made trips to all stations several times.

Q. Can you fix the times when he was with you, approximately? A. Approximately he was, I mean at the beginning he was with us and at the end he was with us; if I recall, he left the company for a short period of time, I don't know, for one or two months, and came back again.

• • •

(433) Q. You met with Mr. Gotch and Crawford, did you? A. Yes, I met them.

Q. In June of 1951 was it? A. Yes, I did.

Q. And did you give them some instructions as to the preparation of a report? A. Yes. I told—

Q. What were they? Will you tell us, briefly. A. I told him to—

Mr. Schoenwald: I am going to object to this on the ground that it is hearsay so far as we are concerned and tends to be self-serving. These were not conversations with the plaintiffs in this action or when the plaintiffs were present. He can tell us that he told them to be very honest and be very nice.

The Court: Mr. Cox has already testified with respect to a connection betwen this gentleman and the plaintiff company. And the corporations and partnerships have to deal frequently with representatives of various kinds. And if you had a representative in touch with this defendant carrying (434) on any form of exploratory or preliminary negotiations, it seems to me that it is very relevant to the issues of the case.

Mr. Schoenwald: I think that the last question was a conversation between Gotch and Crawford who prepared the prospectus. They were not agents of ours nor did we have any communication with them.

The Court: You have made Gotch and Crawford part of this case very vividly throughout your examination by indicating that they were acting for the defendants in the preparation of this report. You have even explored the questions of communications passing between CAVE and Gotch and Crawford. It seems to me that if the plaintiffs were in touch with Gotch and Crawford while this report was being prepared that is a matter of very direct relevance to this case.

Mr. Schoenwald: None of my questions indicated that plaintiffs were in touch; merely that we received—

The Court: Oh no, you didn't indicate that they were in touch; you indicated that the defendants were in touch.

Mr. Schoenwald: That which may be (435) admissible on cross-examination of a hostile witness to ascertain facts within his knowledge is not necessarily, I think, admissible when a party in his own behalf attempts to introduce matters; that which is self-serving can be an admission in so far as your own party is concerned.

The Court: That is true, but I will overrule the objection.

* * *

(440) Q. Colonel Marcano, prior to August 15th did you have any indications from the Ministry as to when they expected you to start flying your franchise again? A. Yes.

(441) Mr. Schoenwald: Objection, your Honor.

The Court: Overruled.

Q. Will you tell us what those were and when they were?

Mr. Shoenwald: cour Honor, I would like to be heard on this objection. One of the issues in this case is the possession of the rights by the defendant. Now a conversation by telephone or in person between this witness and the official of the government as evidence of the rights that he had in that government would seem to me to be hearsay. And, further, I direct to your Honor's attention that there is a specific statute in the Federal Rules and

in the Federal Code as well as the Civil Practice Act and the Federal Rules, dealing with the method by which you prove rights or claims or other status in connection with a foreign government, and that something more than a telephone conversation between this witness and an official of the government is necessary to demonstrate what the rights of this company were in those countries.

The Court: Yes. But the evidence already shows that his plane was flying this route at the time you claim he had no franchise or that his (442) franchise was in jeopardy. And the fact that these planes were being cleared in and out of the airport at Caracas, plus any dealings he had with the government may have some probative value in the case. The technicalities of the rules of evidence must serve the purpose of searching out the truth; they must not be used for the purpose of obstructing what the actual facts were. All we are trying to do is to ascertain what the actual status of the matter was. And, then, I think your argument is directed more to the weight than to the admissibility of the evidence. And I will permit you to argue that later. But I overrule the objection on the admissibility.

Q. Will you please answer the question?

(Question read.)

Q. That is, conversation with the Ministry of Communications. A. Several times they asked me when, according to my information to them, I was going to start the operation. I told them that I was going to start on the 15th of August. So they let me know that the Ministry was

aware that I had offered to start on the 15th of August, that they expected me to start (443) on the date I had promised to start. And I felt that otherwise my franchise would be in jeopardy if I didn't comply with what I have offered and what was in the contract with the Ministry.

Mr. Schoenwald: If your Honor please, I don't want to be extending the trial, but I think that counsel has indicated that he had his franchise here in court, and he also indicated that he had his traffic rights here in court. If he has his franchise here in court and if he has his traffic rights in court, which he has produced pursuant to my request, I think, aside from expedition, if he offered these documents in evidence and if they constitute a franchise, we will have it in; but to use oral testimony to either contradict or extend a written document from the government seems to me to be improper.

Mr. Nickerson: It is not offered, his testimony is not offered for that purpose.

The Court: It is not offered for that purpose.

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(445) Q. Did you have that prepared in Venezuela? A. In Venezuela, yes. I got a letter from the Ministry on Foreign Relations.

Q. I show you Defendant's Exhibit AM for identification. Is that the letter you refer to? A. That is the letter. I told the Foreign Relations that AVE are re-navigating its flight.

Mr. Schoenwald: I would like to make an objection again and let the record indicate, if I can, with your Honor's permission, that I have a continuing

objection to all testimony between this witness and persons who are not parties to the suit, and particularly an objection to all conversations between this witness and government officials of Venezuela or of other countries.

The Court: All right, you have a continuing objection.

Mr. Schoenwald: And, then, your Honor, I should like to bring to your attention that this apparently is not a rehabilitation of the examination that previously went on, but I get the feeling that counsel is now beginning his affirmative case on the counterclaim. And I am wondering if that was the—

(446) The Court: No; that is not his purpose, and he is not permitted to do so. His purpose is to controvert the implications of your examination tending to impugn the good faith of this witness in connection with his dealings with your clients.

Mr. Schoenwald: Then none of this testimony will be used in connection with proof of the existence of a franchise.

The Court: It will be used for any purpose that I choose to use it for, if it is properly in the case. Do you expect to be the guardian of my judicial conscience after this record is in? I don't understand the objection.

Mr. Schoenwald: No.

The Court: You don't have any standing to object to what is properly in the record once it is in the record. If it is being properly brought out and it is a matter of proof in the record it seems to me that from there on it is a matter of marshaling the evidence and arguing its weight. But your only standing now is to argue against its admissibility, and on that I overrule you.

By Mr. Nickerson:

Q. I am sorry. Did you finish your answer?

(447) (Record read.)

A. (Continuing) Renavigating its flight, and I was going to Rome and would like to have the assistance, as a Venezuelan citizen, of the Embassy of Venezuela in Rome. So they gave me that letter.

Q. When you got to Rome did you see the Ambassador, Venezuela Ambassador in Rome? A. Yes, I saw the Venezuela Ambassador in Rome.

Q. Will you tell us what you said to him? A. Well, I told him, I explained to him that AVE was reopening its operation, renavigating its operation; and I explained to him that we had an American outfit to operate the airline for us, that we had gone into some business with them and that I would appreciate it if he would give his cooperation within the scope of his range or whatever he could do to help the airline and to help these people that were connected with us. He said that he would be glad to cooperate. We had a general conversation on the matter.

Q. Did you know the Ambassador personally? A. I did know him personally, yes.

* * *

(450) Q. Now, Colonel, did you see a man named Romirez Torres? A. Yes, I saw him.

Q. Who was he? A. He was the Immigration Attache to the Embassy in Rome.

Q. Venezuelan Immigration Attache? A. That is it.

Q. Was he the person who held the office which Mr. Savino formerly held? A. He was the man who held that office, yes.

Q. Did you talk to Mr. Romirez Torres? A. I talked to him.

Q. Will you tell us in substance what you said? A. In substance—

Mr. Schoenwald: This is particularly objectionable at this time; this is hearsay.

Mr. Nickerson: It shows his cooperation. This was his job.

(451) Mr. Schoenwald: We are in no position to compete with this kind of hearsay. We have nobody who can come in and say anything about this conversation. We have no way of contradicting purported conversations. It is again self-serving.

The Court: Yes, but in the light of your questions to this witness in which you have implied everything from corruption of government officials, bribery, intimidation, unethical conduct, fraud, misrepresentation and everything, how can he defend himself except by referring to these other matters? I think you have opened the door to all of this by virtue of your examination, and by virtue of the documents that you have introduced into evidence.

Mr. Schoenwald: I think he can defend himself by explaining a particular letter, a particular document, by explaining it away, because these documents that we have used are in the nature of admissions and the admissions can be explained; but to go into a conversation between himself and another person seems to me to be going far afield of an admission. In explaining away an admission it would seem to me to deal with the person from whom he received the letter, if he wants to say (452) what he understood him to mean when he wrote the letter and the circumstances under which he wrote the

letter; but to go on with a conversation with an entirely different person who is not a party to this proceeding is not explaining away an admission.

The Court: I consider this to be an explanation of his course of conduct in connection with the operation of the business and in connection with what might have been his reasonable expectations at the time with respect to this business. And I think that in view of the fact that you brought it out yourself, opened the door to all this, that the only way he can answer it is by testifying. I will allow it. I overrule the objection.

Q. Will you tell us what your conversation was with Romirez Torres? A. I told him the same—I had the same general conversation I had had with the Ambassador. I explained to him what I was going to do, and I told him about the USOA would be in business with us. I introduced him to Burger and asked him to cooperate within the scope of his duties. And he said that he would cooperate.

The Court: What date was this when you (453) introduced him to Burger?

The Witness: That was in the early part of—between my arrival in Rome in September, 25—

Q. August—excuse me. You left— A. August 23rd—24th or 25th, and September 9th.

The Court: So it was either the end of August or the early part of September?

The Witness: Or the early part of September.

The Court: This conversation took place in the presence of Mr. Burger?

The Witness: In the presence of Mr. Burger, yes, sir.

The Court: All right.

Mr. Nickerson: I am sorry. I had forgotten that, your Honor. I would have brought it out.

The Court: Well, it is brought out now.

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(455) Q. Now prior to the time that you left Rome—and can you give us the date of that approximately? When did you leave Rome to go back?

The Court: September 9th.

A. September 9th.

The Court: September 9th.

Q. Did you sign an agency agreement with Coe & Clerici?

Mr. Schoenwald: Objection.

The Court: Objection overruled.

A. Yes, I signed.

Q. Was that at Mr. Burger's direction? A. It was at Mr. Burger's direction; it was prepared by Mr. Burger and M. Van Boheman.

Q. Is that Defendant's Exhibt AT for (456) identification? A. Yes.

Q. Did Mr. Burger tell you whether or not, after that agreement with Coe & Clerici was signed, that Coe & Clerici were going to handle all of the traffic matters in Rome? A. Yes, that was the object of the agreement.

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(457) Mr. Schoenwald: If your Honor please, to save the time of the Court, I would like to have a continuing objection to all of the conversations with persons who are not parties to this action which I have previously characterized and objected to as hearsay, because I feel that almost every conversation, except with Mr. Burger, under my concept of the rules, (458) is inadmissible.

The Court: Burger was the agent and representative of your clients, was he not?

Mr. Schoenwald: I say except as to Mr. Burger. I feel that the testimony of this witness, since he has been examined by Mr. Nickerson, except for his conversation with Mr. Burger, has been entirely hearsay, and I find that each question, except those relating to Burger, are objectionable. I didn't want to rise—

The Court: The last question was did he get in touch with the Spanish agent and he said he did. There is no hearsay there. It is an act. The act of communicating with the Spanish agent pursuant to a conversation to which he testified couldn't possibly be open to an objection as hearsay.

Mr. Schoenwald: No. Let me qualify what I said by relating it to in so far as it presumes to tell us about his conversations with persons other than—

The Court: I will deal with them as they arise. If this conversation took place in the presence of Burger or if it took place pursuant to the request or instructions of Burger and in accordance with his (459) instructions, it seems to me that they are perfectly valid. I will deal with them as they arise, and you may have a continuing objection on the ground of hearsay.

* * *

Q. Now coming back to September of 1951 when you got back to New York, Colonel Marcano—you focus (460) on that time—did you have a meeting with Cox and some of his people, you and Marshall had a meeting with Cox and some of his people? A. Yes; we had two meetings with them.

Q. Tell us now, briefly, what was said at that meeting? A. To my recollection, we went to Mr. Cox's office in the Chrysler Building, Mr. Marshall and myself, and when we arrived there he said that this operation wasn't good and that he was not going to continue it unless he had full loads.

So I let Mr. Marshall discuss it with him, and I took part, but mostly Mr. Marshall, and Mr. Marshall told him that we had a contract and that he had to perform.

He said he was not going to perform unless he had full loads.

So I said there is the contract and we are performing so you should perform.

Q. Was Mr. Burger there? A. Mr. Burger was there.

Q. What did he say, in substance? A. Mr. Burger, I recall him saying, "Well, gentlemen, let's get together, let's talk this thing (461) over." He had a lot of maps, I mean charts and papers and things. He wanted us—he wanted us to go together again, I mean follow up the operation.

Q. Did he express himself as to whether he was enthusiastic or not enthusiastic? A. He was very enthusiastic about the operation, he thought the operation would be a success if he continued it and he so expressed himself. There was—Mr. Jones every time that he referred to the contract he would say, "There is no contract, let's tear up the contract." That is what I recall as the general trend of the conversation. So at that point, we had been discussing for about an hour or an hour and a half, I

don't remember how long, then Mr. Cox said that I had an attorney and that he did not have an attorney, so that he wanted an attorney.

So I think Mr. Marshall told him, "Well, get yourself an attorney and we can sit down and discuss it again whenever you want."

So the next discussion was fixed at for the next day at ten o'clock, the meeting. We left at that time. Substantially it was— that was it.

Q. Will you tell us what went on at that meeting, who was there, very briefly? (462) A. At what meeting?

Q. The second meeting. A. At the second meeting there were Mr. Cox and Mr. Jones, Mr. Burger, I think that Mr. Clemett was there, and Mr.—attorney, Mr. Doherty.

Q. Who was he representing? A. He was representing USOA. And there was Mr. Marshall, Mr. Russell, who we had talked to.

Q. Was Mr. Russell of the firm then of Hale, Stimson, Russell— A. And Nickerson. And I myself. I think those were the people that were there.

Q. Tell us briefly what was said at the meeting. A. Well, the general discussion was the same general way as the day before. Mr. Cox kept insisting that he wouldn't operate unless he had full loads, and Mr. Jones wanted to tear the contract up, that there was no contract.

Well, we could not reach an agreement. So after, I don't know if we went out to lunch or went in an outer office, Mr. Russell, Mr. Marshall and myself, so we came back with the proposal made by Mr. Russell that we would forego, CAVE would forego the $1500 or the $3000, whichever the case (463) may be.

Q. $3000 a week guaranteed in the contract? A. In the contract. But—I am sorry, I forgot. Mr. Cox had asked Mr. Burger how much it would take to follow up this

operation, and I think Mr. Burger said about sixty thousand for the next ninety days.

Q. What were those follow-up expenses? Developmental things? A. They were developmental expenses to keep the—

Q. Development of traffic? A. Development of traffic, yes. So he said that it would take about $60,000 in the next ninety days to really start traffic flowing in the way they expected it.

So Mr. Cox said he didn't have that kind of money, and so forth.

So we went out. And when we came back, Mr. Russell, we agreed that Mr. Russell propose to Mr. Cox that we would forego the guarantee of fifteen hundred or three thousand dollars a month for the next 90 days and if at 90 days we would sit down again and if there was—if the company wasn't operating (464) on a profitable basis those moneys would be—we would forego that money, and if it was on a profitable basis we would—that money would be accrued. It would be due to CAVE. I mean, that is in general what I—

Q. Did Mr. Cox say anything when that proposal was made? A. Well, he said it was a matter to be discussed, that he would like the lawyers to sit down, and so forth, and discuss about it and see if they could reach an agreement there.

So Mr. Russell wanted to find out, wanted to know if he was in agreement with this proposition. And after a while he said, "Well"—

Q. "He" meaning Mr. Cox? A. Yes, Mr. Cox. Mr. Cox said, "Well, I am in principle, but I want the lawyers to sit down and work out something that I could approve of," or something to that matter.

Q. Did you write Defendant's Exhibit BM for identification? A. Yes, I did.

Q. Did you mail it to the addressee? A. Yes.

(465) Mr. Nickerson: Sorry, your Honor, these were not part of the stipulation.

Q. Did you write Defendant's Exhibit BK for identification and mail it to the addressee? A. Yes, I did.

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Re-direct Examination by Mr. Schoenwald:

Q. Colonel, I think you testified that you showed Mr. Waters the manifests from time to time; is that right? A. I did not testify to that. I said that he had access to the manifests and he saw them.

Q. Did the manifests indicate whether the fare was paid or whether the money was collected? A. I would not remember that point in the manifest right now.

Q. Ordinarily a manifest does not contain that information, does it? A. I haven't seen the manifests for a long (466) time. I wouldn't—

Q. You told us that Mr. Waters furnished you with some reports. Do you have those reports here? A. I don't know if we have any in our papers.

Mr. Nickerson: I did not hear the question.

Mr. Schoenwald: I think the Colonel said that Mr. Waters had furnished him with some copies. Do you have the reports here?

Mr. Nickerson: No.

Q. Is it not a fact that as early as May 1951 you sent telegrams directing the transfer of the office to Mr. Wooten? A. Yes.

Q. Authorizing the transfer? A. Yes.

Q. And the conferences you had with Mr. Cox on this subject were in August, is that right? A. That is right.

Q. Isn't it a fact, Colonel, that Alitalia is a partly government-owned airline? A. Yes, it is.

Q. Isn't it a fact that they told you that they wanted you to reduce your trip frequencies to one trip a week? (467) A. I testified to that, yes.

Q. Isn't it a fact that it is the custom in the aviation industry for one country to extend to the other country reciprocal rights so that if one country has rights to one trip a week the other country's airline also has rights to one trip a week? A. That is not according to trips but according to traffic, volume of traffic.

Q. Doesn't it ordinarily follow that each airline carries approximately the same number of passengers in one airline so that the only way in which countries offer each other reciprocal rights is largely in terms of trip frequencies?

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A. To my understanding, what I told you is that it is more pertinent to traffic volume than trip frequency.

Q. And Mr. Burger told you, did he not, in Rome, that he had been advised by Alitalia and by the government officials that in view of their long standing complaint that he could no longer fly more than one trip a week? (468) A. He did not tell me such a thing.

Q. Did you sign a contract with Alitalia at Mr. Burger's direction or without Mr. Burger's direction? Did you sign a contract with Alitalia in September 1951 reducing your trip frequency to one trip a week? A. I did not reduce my trip frequency. We said that we intend to go only one trip a week at that time.

Q. Did you sign a contract saying that you were going to fly one trip a week? A. We said we were going to fly one trip a week at that time.

Q. Was that after Alitalia came to you and indicated that they objected to you flying more than one a week? A. Alitalia didn't come to me; Alitalia had a conversation with Mr. Burger.

Q. Did you report to USOA or did you tell Gotch and Crawford or Mr. Marshall or anyone that you had received advice from the official government airline of Italy that they didn't want you to fly more than one trip a week, at a previous time? A. Alitalia is partly owned by the government, but I don't understand that it is an official government (469) airline.

Q. You understand, first of all—I will amend my question to say, did you tell U. S. Overseas Airlines or Gotch and Crawford or John Marshall, in order to have U. S. Overseas Airlines advised, that you had in 1950 or 1951 received advice from Alitalia that they didn't want you to fly more than one trip a week?

Mr. Nickerson: I object. There is no testimony that he received any advice in 1951.

The Court: He has already testified that Alitalia spoke to Mr. Burger, and if Alitalia spoke to Mr. Burger that is notice to USOA, isn't it?

Q. Didn't you receive advice from Alitalia during 1950 and 1951, before Mr. Burger entered the picture, before you signed the contract with U. S. Overseas Airlines, that Alitalia wanted you to reduce your trip frequency? A. I testified that in 1950 or in the middle of 1950 I was approached by Alitalia and we had discussions on the subject.

Q. With respect to the discussions on the subject of reducing your trip frequency? A. We had discussions with the Alitalia people, (470) yes.

Q. The nature of the discussion was an expression on

the part of Alitalia that they would like you to fly less often? A. That is right.

Q. Did you report to U. S. Overseas Airlines or to Gotch and Crawford or John Marshall that you had received on behalf of Alitalia an expression of their desire that you fly less often? A. No.

Q. Now you spoke previously, I think, of seeing to it, in connection with your conversation with Alitalia, of seeing to it that your government would adversely affect the rights of Alitalia if some action was taken in connection with it? A. We didn't talk rights; we talked about volume of traffic.

Q. You indicated that you were in a position to make representations to your government adverse to Alitalia? A. Not adverse to Alitalia. The same volume of traffic to equal the volume of traffic or limit the volume of traffic of Alitalia out of Caracas and of AVE out of Rome.

(471) Q. You could make representations to your government with a reasonable chance of success relating to trip frequency or some other consideration affecting the volume of traffic of Alitalia? A. I had the right because of the arrangement for the airline to Rome, Italy.

Q. You also knew that Alitalia had this right and probably had the same degree of influence you had, particularly in view of the fact that Alitalia was partly owned by the government? A. Yes.

Q. And so when Alitalia, partly owned by the government, with the same degree of influence which you indicated you had before, advised you that they had a feeling that they would like you to reduce your trip frequency, it was a matter of some consequence to you, wasn't it? A. If they could do it I had the same right to come to their measure.

Q. As a matter of fact by a contract you did it eventually, didn't you? A. I did do it, yes, in August, 1951.

Q. Did you ever make a complaint to Mr. Cox prior to the institution of the suit, in the sending (472) of the letter by your attorney asking for the airplanes and declaring an end to this transaction, other than that letter? Did you ever make a complaint to Mr. Cox about the way they were conducting, he was conducting these operations? A. I did not.

The Court: By that "letter" you refer to what exhibit, please?

Mr. Schoenwald: I cannot tell you the number of the exhibit, but I can describe it. It is Defendant's Exhibit—this letter signed by Mr. Marshall in which he asks for the airplanes.

The Court: Very well. I have the exhibit in mind. I can find it.

Q. When you introduced Mr. Burger and Mr. Van Boheman in Italy to the Embassy and Consular officials and you asked them to cooperate with them and provide facilities, did you advise them that they would provide the same type of facilities that Mr. Cover had been arranging for in connection with the various payments to the consular officials? Was this the kind of cooperation you arranged for?

* * *

(473) Q. You introduced them to these officials; were they the same, the officials the same, Mr. Cover gave you his receipts for payment to them? A. Mr. Cover never gave me receipts for payment to officials of the Government of Venezuela.

Q. Were they the same people mentioned in the exhibit introduced in your examination earlier this afternoon in connection with Mr. Cover's expense account?

* * *

Q. Exhibit 293 for identification. A. Who were the people you refer to—

Q. Do you recall the names of the officials you introduced: Alberto Tommassini, Venezuelan Consul in Rome, Nicholas Perazzo, Consular, Napoleon Jimenez, First Secretary of the Embassy, Ambassador Gil Fortoul, various unauthorized agents and employees of the Venezuelan Embassy? Those are the only names I have. A. I introduced Mr. Burger to the Ambassador and to Mr. Romirez Torres who was the Immigration (474) Attache.

Q. Were the cordial relations the same Christmas present, entertainment, sundry expenses, and confidential gifts and cash payments; is that the same cooperation that you asked them to arrange?

The Court: Don't answer that. That is argumentative, improper in form.

Mr. Schoenwald: I am sorry.

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(477) Redirect Examination by Mr. Schoenwald:

Q. As a matter of fact wasn't this Alitalia agreement providing for a route in Germany dependent upon your company's getting a route to Germany? A. Yes.

Q. Did you ever get a route to Germany? A. Yes.

Q. Have you got any evidence of that? A. I got a response from the Ministry saying—

Q. Just a minute. Have you got a document here signed by an official of your government certified to by the American authorities showing that you got a route to Germany?

Mr. Nickerson: Yes, we have, your Honor. I will introduce it.

Mr. Schoenwald: Would you, please.

Q. I notice this agreement with Alitalia has a space for the signature, for Mr. Marcano and a space, and Mr. Burger, and it contains only the signature of Mr. Marcano. Can you explain that? (478) A. It has the initials of Mr. Burger on the lower left side.

Q. Can you tell me why there is a space provided for the name of Mr. Burger and he signed in the lower left side? A. I don't recall.

Q. Will you tell us which is the initial of Mr. Burger (handing), and I wonder if you could mark it with a pencil so that we have—

Mr. Nickerson: Don't you concede that Mr. Burger initialed it?

Mr. Schoenwald: I don't.

A. Here is Burger's (indicating).

Q. Which one is that? The one on the right? A. The one in the middle.

Q. The one in the middle. Thank you. Did you have any conversation with Mr. Burger dealing with the wisdom of getting these routes to Germany instead of to Italy? A. I did not—

Q. He didn't talk to you? A. He talked to me about it. He explained what he thought. I thought it was a good idea if it could be done.

(479) Q. Did the conversation take more than five or ten minutes? A. I wouldn't remember now.

Q. This was a matter changing the basic character of the operation of your airline, wasn't it? A. It was.

Q. Did you discuss it for a few minutes or a couple of hours? A. No; we discussed it. He told me what he intended to do about this line, and I thought it was a good idea.

Q. As a matter of fact you discussed it several times or several hours, isn't that right? A. I wouldn't recall; I

don't remember. I know that generally I discussed it with Mr. Burger.

Q. You discussed it? A. Yes.

Q. In view of the fact that they were getting your airline into Germany, in view of the fact that they were cutting your operation out of Italy in half, I wonder if you could tell us did you ask Mr. Burger why he was going to discontinue flying twice a week from Italy? A. They were not cancelling our other flight (480) to Italy. We were limiting ourselves to one flight.

Q. Did you ask Mr. Burger what the reason was to limit yourself to one trip a week out of Italy? A. He thought that it was better for the operation.

Q. Did he express an opinion as to why it was better? Did he say that there were no passengers in Italy? Did he suggest that at all? A. He said that he thought it was better for the operation in general.

Q. Was there any indication on the part of Mr. Burger that there weren't any passengers in Italy or aren't going to be any passengers in Italy and that is why it was necessary to go to Germany? A. I don't remember we discussing about the passengers in Italy.

Mr. Shoenwald: All right.

Mr. Nickerson: I may have overlooked just one question, your Honor.

Recross Examination by Mr. Nickerson:

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(481) Q. Did you ask to have statistics, labor statistics, compiled from the Government of Venezuela showing the immigration from 1950 to 1955? A. Yes, I did.

Q. I show you a document. A. Yes; I had this prepared.

Mr. Nickerson: I offer it in evidence.

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Mr. Schoenwald: I am going to object to its admissibility on the ground that an official document (482) must be—

The Clerk: Defendant's Exhibit BW marked for identification.

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The Court: Well, I sustain the objection.

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(483) By Mr. Nickerson:

Q. Were you generally familiar with the immigration into Venezuela during the years 1950 to 1955? A. Yes, generally.

Q. And in round numbers, would you be generally familiar with the fact that in 1951 there were some 42,000 immigrants?

Mr. Schoenwald: I am going to object on two grounds; on the first ground, as a matter of fact, that it is leading; on the second ground, there is no adequate foundation that has been laid. We ought to know something about the source of his knowledge and the extent of it. The mere assertion on the part of the witness that he knew the statistics is hardly a foundation to make him a statistician or an expert witness on statistics.

The Court: He was in the transportation business. This is matter that entered into his business. I think there is sufficient foundation to justify some knowledge on that score. Then the papers that have been introduced in evidence have frequent allusions to immigration, both past and future, and I think he can state what he knew to (484) be the flow of immigration into Venezuela, if he knows. You

can cross-examine him and find out what the source of his information was, if you wish.

Mr. Shoenwald: I still object as to form.

Mr. Nickerson: I will rephrase it.

Q. Can you tell us in round figures, taking Defendant's Exhibit BW for identification, what in round figures the immigration to Venezuela was in the year 1951? A. Say about 60,000, 50 or 60 thousand. 42,000.

Q. Would you say that from 1951 to 1955 the immigration, from your personal knowledge, the immigration has decreased or increased? A. It has increased, definitely.

Redirect Examination by Mr. Shoenwald:

Q. What proportion of these people who moved were carried by ocean? A. It is a large proportion of it.

Q. Most of them? A. I would say about 80 per cent, 70 or 80 per cent.

Q. Are they carried by other airlines? A. Yes, they are carried by other airlines, too.

* * *

(485) ALEJO DECERVERA, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Schoenwald:

Q. Where were you born, Mr. De Cervera? A. I am born in the north of Spain, Santander.

Q. And did you attend school in Spain? A. Oh yes.

Q. What schools have you attended? A. The University of Oviedo, in the north of Spain. That is, in Spain.

Q. Did you receive a degree from this school? A. Yes.

Q. What degree? (486) A. Licenciado en Derecho.

Q. And have you any other academic attainments in Spain? A. Well, I went through a competitive examination in Spain to become a judge.

Q. Are you a judge in Spain? A. I am a Judge in Spain.

Q. Do you still hold your authority or license in that capacity? A. Well, I am on a leave of absence; that is to say, I have no court. But I am still a judge and I can re-enter in my career when I want.

Q. What are you doing in the United States? A. I came here with an invitation to visit this country for six months. I thought it was very interesting to me to study at Columbia. So I asked for an extension of my permission and my invitation, and they granted me that. I studied at Columbia the first year as a candidate for the Master of Comparative Law degree. I got it last year.

Q. Are you now still matriculated at Columbia University School of Comparative Law? A. I am through now.

Q. Are you returning to Spain? (487) A. Yes. After my first year they invited me to study at Columbia, still a year, in order to enable me to get another degree and to be a candidate for the J.S.D. degree, and they appointed me as an associate in comparative law in the Parker Comparative School at Columbia. So in my second year I was at Columbia as an associate in comparative law, and I got my second degree, Master of Law.

Q. Have you from time to time had occasion to examine the law of South American countries? A. Oh yes, on several occasions.

Q. Have you done this in your professional capacity as well as scholastically? A. In both, yes, because I helped Professor De Vries, who is a Professor of Comparative Law at Columbia and Foreign Law, in a litigation where he appeared as an expert in Guatemalan law. So I had an occasion to go through Guatemalan law.

Q. Have you had occasion to look at Venezuelan law— A. Yes.

Q. —prior to this proceeding or largely in connection with this proceeding? A. Very specifically, only in relation with this (488) proceeding. But generally I have some insight in South American law which, by the way, is not very different from Spanish law.

Q. Have you seen this franchise before—

Mr. Schoenwald: I would like to have this franchise and the translation marked as a separate exhibit.

A. Yes, I am familiar with this franchise.

Q. Have you made a specific examination of Venezuelan law after an examination of this franchise? A. Yes.

The Court: What is the exhibit number?

Mr. Schoenwald: I am asking for a new number to be assigned to it, although it is comparable to one that our adversary has. Can we work with it until a number is assigned to it?

The Court: Yes.

Q. Now I show you this paper with the seal of the Library of The Congress of the United States on it which was previously referred to by Colonel Marcano I think. Can you tell me what that is? A. Well, that is the photostat of the, the number of the Gaceta Oficial of Venezuela; and under Ministry of Communications there is a CAVE asking for (489) a renewal or the permission granted to CAVE in order to make operations, commercial operations, in an outside country.

Q. May I have that?

Mr. Nickerson: May I have the date?

Mr. Schoenwald: We will try to—

Mr. Nickerson: Will you tell me the date of it?

Mr. Schoenwald: The 8th of August, 1950.

Q. Now can you tell me with respect to this—

Mr. Schoenwald: Have you got the number ready for this, sir?

The Clerk: I don't know what that is.

Q. Can you tell me what the meaning of paragraph 13 of this paper is? A. Yes. This paragraph 13 is a provision according to which the contracting party can transfer the rights and obligations appearing in this contract after previous approval of the Ministry of Communications only to a Venezuelan corporation, the directors of which, capital, and shareholders be in its majority Venezuelan at least in a 55 per cent.

Q. Can you tell us with respect to the (490) ownership of shares by corporations other than Venezuelan corporations, does this document have anything to add or advise on that subject? A. Well, it is my understanding that this document flatly prohibits any foreign company from having any participation in this Venezuelan company.

Q. Well, by "participation," what is meant? Does that include the ownership of stock? A. Oh, yes.

Q. Then can you tell me what it is in this document or what it is in your researches that causes you to have the opinion that this document states that no stock can be owned in CAVE by an American company? What is there in this paper that gives rise to that opinion? A. The contracting party could yield the rights and obligations only to a Venezuelan corporation.

Q. Is it the phrase "yield the rights and obligations of the company"? Is that the phrase that you have in mind? A. Yes.

Q. Why do you say that that relates to the ownership of stock? Could that mean anything other than the ownership of stock, or does that mean things (491) other than the ownership of stock and the ownership of stock? In other words is there anything in there which—is it clear to you and is there anything you can tell us to help make it clear to us that the phrase which you have just referred to means that non-Venezuelan companies are limited from owning the stock?

Mr. Nickerson: I am going to object to his leading this witness.

The Court: Yes. Sustained.

Q. Well, I think you have testified and told us that this phrase means that no Venezuelan company, no American company can own stock. Can you tell us what there is, either in the language or in your researches, which tends to be the basis of that opinion? A. CAVE can transfer to a corporation its right to the franchise.

Q. It can? A. It can. Yes.

Q. Yes. A. But only to a Venezuelan corporation.

Q. Well, I wasn't asking about the franchise but I was asking about the stock at this moment. (492) Can it sell its stock to a non-Venezuelan corporation? A. It can.

Q. It can or cannot? A. Excuse me. I withdraw that. It can't.

Q. Sell its stock? A. Sell its stock.

Q. How do you arrive at that conclusion? A. May I have my papers?

Q. You mean the brief case that you came with? A. Yes.

Q. Why certainly. Did you mean this opinion or the brief case? A. Yes, this opinion.

Q. This opinion (handing)? A. Yes. Will you repeat the question now?

Alejo DeCervero—For Plaintiffs—Direct:

Q. Will you tell me what it is in this document and what it is in your researches that gives rise to the opinion that you have expressed that an American company cannot buy the stock of CAVE? A. First there is a provision in the law of civil aviation providing that no more than 45 per cent of the stock of the Venezuelan corporation can be held by a foreign company. The amount of shares has been reduced in this contract. According to this contract (493) it is not 45-49, but 45.

Q. Well, if you will bear with me a moment, are you now talking about what individuals can have or what the corporation can have? A. First the corporations. No corporation is entitled to have this franchise.

Q. Well, is the corporation entitled to have any stock in this company, an American corporation entitled to have stock in this company? A. It is not.

Q. All right. How do you arrive at that conclusion? A. The very phrase "only to a Venezuelan corporation."

Q. And that phrase refers to stock? A. This phrase refers to the nationality of the corporation who can have rights to the franchise.

Q. And does it refer to the nationality of the corporation that can have rights to the stock? A. (No answer.)

Q. Well, let me ask you the question again as clearly as I can, Mr. De Cervera. Can an American corporation buy stock in CAVE? A. An American corporation, no.

(494) Q. Is there something in the franchise which says so? A. Yes. Only to a Venezuelan corporation.

Q. And that refers to stock, is that right? A. Yes.

Q. All right.

By the Court:

Q. What is the specific language that you refer to? A. In English.

Q. Yes. A. The contractor may transfer and assign the rights and obligations appearing in this contract after

prior approval of the Ministry of Communications only to a Venezuelan corporation.

Q. Now under our concept of law the rights and obligations under a contract refer to assignment of the contract and not to the juridical composition of the assignor. Now you are saying, as I understand you, that the assignor, as a juridical person, must be 100 per cent Venezuelan, that is, that the corporation must be a wholly-owned, wholly Venezuelan corporation, that 100 per cent of its stock must be owned by Venezuelan citizens, whether corporations (495) or individuals, and that no American corporation or citizen can own any part of that stock; is that your testimony? A. Not exactly, because a Venezuelan corporation can be Venezuelan in spite of having part of its stock in non-Venezuelan hands.

Q. Well, your testimony is that that phrase prevents the transfer of any of the stock of the assignor company of such franchise holding company which would wish to transfer its right and obligations, it would prevent any of the stock of such a company, CAVE in this case, from becoming the property of an American corporation; is that your opinion? A. That is right.

Q. And you base it upon that language? A. Yes, sir, I do.

Q. Well now, under the law of Venezuela, under this Civil Aviation Law that you have referred to, did I understand you correctly to say that it is possible for a minority of the stock to be owned by an American or foreign company? A. Yes, sir.

Q. So that— A. No, not an American or foreign corporation.

(496) Q. Well, then— A. Only to individuals.

Q. Oh. So that a minority of the stock in a franchise holding corporation, under Venezuelan law, can be owned by foreign individuals? A. Individuals.

Q. But not by a foreign corporation? A. Corporation.
Q. To what extent does that law affect, if at all, the opinion you have given concerning the language in that franchise?

Mr. Schoenwald: I don't think that the witness understands the question, nor am I clear—

The Court: I will rephrase it.

Q. Does the Law of Civil Aviation of Venezuela have any bearing upon the opinion which you have given here and expressed this afternoon? A. Certainly. The Law of Civil Aviation states almost the same, only the proportion is different.

Mr. Schoenwald: If your Honor please, may I suggest this: There are two questions. And I think that the witness is not clearly separating the questions because he doesn't understand that we are trying two. The one question is to what extent may (497) American individuals own stock in a Venezuelan corporation. On this question there is a Venezuelan statute in the Civil Aviation Law, and on this question there is a provision in the franchise. They vary slightly with respect to percentages. The percentage in the franchise is 55 and the statutory percentage is 50 per cent. And there is another—

The Court: 45 in the statute.

Mr. Schoenwald: 45 in the statute. There is another entirely separate consideration, namely, can an American corporation own stock. As to this, there is nothing in the Venezuelan law; there is only something in the franchise which prohibits that. I think that is the substance of the witness' testimony. And I would like to ask him does he understand that to be the substance of his testimony.

The Witness: Yes.

Mr. Schoenwald: And is that what you are endeavoring to say?

The Witness: Yes.

The Court: Do you wish to cross-examine?

Mr. Nickerson: I am sorry. Is he finished?

Mr. Schoenwald: I have other points which I would like to adduce from this witness, unless you (498) want to cross-examine point by point.

The Court: No. I thought that was all you wanted him to explain.

By Mr. Schoenwald:

Q. Now with respect to the franchise of the defendant corporation, is it necessary before this franchise becomes valid that it be published in the Official Gazette of Venezuela? A. I do. I think so. Yes, sir.

Q. Now will you tell me the basis of that opinion and also the reason for such a law, if you know it? A. First, there is a provision in the law of Civil Aviation according to which the administrative acts in which a franchise is granted, and that is my assumption, is extended, must be given notice to the National Congress.

This is established also in Clause 18 of the contract.

I don't know of any procedure according to which the National Congress of Venezuela can take notice of anything without publishing it in the only official report existing in Venezuela, that is to say, the Oficial Gaceta.

(499) Q. As a matter of fact, have you made any examination with respect to whether or not franchises and documents of that character, modifications, renewals, extensions, are by practice reported in the Official Gazette? A. Yes. I have been reading many numbers of the Gazette Officiale and I have come across several examples

in which the renewal of the franchise has been published in the Oficial Gaceta.

Q. Have you examined the Gaceta Oficial of Venezuela from July 1951 through September and October of 1952, and have you made such an examination? A. Yes.

Q. Where did you make such an examination? A. In the Venezuelan Consulate, here at New York.

Q. And have you found during your examination any document purporting to be a renewal of the franchise which expired on July 31, 1951? A. Nothing at all.

Q. Have you found anything in the Official Gazette purporting to be a modification or an extension or anything else affecting that franchise?

Mr. Nickerson: Sorry, your Honor; I (500) object to the characterization as expiring on July 31 because of the document already in evidence. August 8th.

The Court: What is the expiration date?

Mr. Nickerson: August 8th.

Mr. Schoenwald: All right. I would like to modify that question to have "July 31" read "August 8."

The Court: Yes.

Q. Do you so assume, that in the last question I asked, instead of expiring July 31 it is August 8, and is your answer the same?

The Witness: Yes.

Cross Examination by Mr. Nickerson:

Q. Do I understand, sir, that by the first sentence of the 13th—will you take a look at it. A. Yes, sir.

Q. —that it is opinion that that prohibits the contractor from selling any of its stock to an American company? A. Yes, sir.

Q. Am I translating correctly when I say the contractor may transfer the rights and obligations under this contract? A. Yes, sir.

(501.) Q. Only to a Venezuelan company? A. Yes, sir.

Mr. Schoenwald: As a matter of correction, I think you are referring to the second sentence on 13, aren't you?

Mr. Nickerson: No.

Q. Well now, sir, is the stock right, the stock a right and obligation arising under the contract? A. No. We are speaking of the franchise.

Q. Yes. In other words, that prohibited, that first sentence, if I get your testimony now— A. Yes, sir.

Q. —that prohibited transfer by the contractor of the franchise to anyone other than a Venezuelan company in the majority of at least 55 per cent? A. The franchise, yes.

Q. The franchise, right. So that didn't prohibit the transfer of shares of stock, it merely prohibited the transfer of the franchise? A. Yes.

Q. Right. Now will you take a look at the second sentence of 13. A. Yes.

Q. "The respective shares will be"—am I (502) translating correctly? —"The respective shares will be nominative and in no way will foreign companies or governments participate in the company." That refers, does it not, to a company to whom the contractor has transferred the franchise under the first sentence of 13, isn't that right? A. Your translation is not exactly mine.

Q. Give me your translation. A. The respective shares shall be registered shares and in no case shall foreign companies or foreign governments participate in the enterprise.

Q. Right. Now that second sentence that you just read, does that not refer to a company to whom the contractor has transferred the franchise? Will you read those two sentences together to yourself. A. Yes, sir.

Mr. Nickerson: That is all.

Redirect Examination by Mr. Schoenwald:

Q. Now I direct your attention again to the second sentence of 13. A. Yes, sir.

Q. Does this second sentence of 13 mean that no American—

Mr. Nickerson: I object to him leading his (503) own witness, your Honor.

Q. Does this second sentence—

Mr. Nickerson: Is that overruled?

The Court: Well, I will request you to please refrain from leading. I think you are leading.

I thought he was rephrasing his question; that is why I refrained from making a ruling because he began to rephrase his question.

Q. Does this second sentence, referring to "In no case shall foreign companies or foreign governments participate in the enterprise" deal with the question of the right of American corporations to buy shares in CAVE?

Mr. Nickerson: Your Honor, I object. He has already answered that and he is seeking to impeach his own witness.

Mr. Schoenwald: On the contrary, the fact that it might affect other corporations does not—

The Court: He may explain it again if he wishes to explain it.

Mr. Schoenwald: May I repeat that?

Q. Does the second sentence of 13 deal with the right of American corporations to buy shares in CAVE? Does it treat of that subject matter? (504) A. I said before yes.

Q. What does— A. And—

Q. I am sorry. A. And the language of the contract is ambiguous. Let us first establish this: Both interpretations are possible. I am sorry I said to you so flatly that "No" before. I think both opinions are possible.

Q. Well, can you say with firmness and with conclusiveness whether or not American companies could buy shares in CAVE?

Mr. Nickerson: Now, your Honor, I object to this. He is trying to lead this witness, who is his own witness.

The Court: Yes. It seems to me that your expert has opened the door to two possible opinions. He entertains one and he is conceding that the opposite opinion is equally valid.

Mr. Schoenwald: I think not.

The Court: How far can you go? You are not the expert; he is the expert.

Mr. Schoenwald: I think we are misunderstanding what the expert is telling us. I think what he is telling us is that both conclusions, neither (505) inconsistent with the other, are possible. For example—

The Court: You can argue that later. He said that the language of the franchise contract is ambiguous. He is starting with an ambiguity. He has

one opinion that he entertains, with the concession that two opinions are possible.

Mr. Schoenwald: I would like him to tell us whether or not the ambiguity deals with the fact that one opinion is possible and the other is possible and whether or not he means that both interpretations can be applied; if he means that both interpretations can be applied can he tell us that one interpretation is interchangeable and the other interpretation is possibly interchangeable?

The Court: I don't know what you mean. You are arguing with the witness now; you can't do that with him. He said that the language of the contract is ambiguous and that both interpretations are possible, his and the one that he conceded when he was examined by Mr. Nickerson.

Mr. Schoenwald: Well, it may not follow from that that it is possible for American companies to buy shares in this corporation. The fact that he can apply both interpretations doesn't mean that (506) on the other hand it is possible for an American company to buy shares in this company. I would like to ask him that question.

The Court: Put the direct question.

Q. Under this franchise is it possible for American corporations to buy shares in this company?

The Court: Is it legal under Venezuelan law?

Q. Is it legal under Venezuelan law? A. Under Venezuelan law or under this franchise?

Q. Under this franchise. Under this franchise, interpreted under Venezuelan law, is it possible for an American corporation to buy shares in this company? A. I

can say in this report I had written both opinions, that is to say, the first opinion in the case it is impossible for CAVE to sell shares to a foreign corporation; and my second question deals with the possibility of an American corporation buying shares from CAVE.

Q. What does your opinion say about an American corporation buying shares from Cave? Can they do it? A. I first wrote "No." And in my second question I am considering this possibility.

(507) Q. What is your opinion now? Can they do it? A. I would say it is more reasonable to assume that they can.

Q. That they can or cannot? A. Can.

Q. Would you spell that word c-a-n or c-a-n-'-t? A. C-a-n.

Q. Now can you tell us whether or not American corpotions or otherwise can buy more than 55 per cent—can acquire more than 45 per cent of the shares of this company? A. No, they can't.

Mr. Schoenwald: All right.

Mr. Nickerson: No questions.

By the Court:

Q. Does it sometimes happen, either because of printing difficulties or congestion of work in the congressional office, that the Gaceta Oficial is behind the effective date of the legal acts which have been adopted? A. Yes, it can happen; but the lagging, what I have observed, is two or three or four days. I have a sample here, granting a renewal of the franchise to Aerovias to Brazil: You see (handing).

(508) Q. Doesn't it sometimes occur where renewal matters are pending which require the formal action of a con-

gressional branch of the government that a course of action is adopted by the interested parties, that is, by the government agencies and by the private parties, implementing the standing arrangement until such time as the renewal conditions are agreed upon and actually effectuated by formal agreement? In other words, doesn't it sometimes occur that you have an intersticia or intervening juridical arrangement where, although there is no valid franchise, the parties act as though there is a franchise and then subsequently the entire matter is brought into a position of legality by adoption of a franchise and by approval on the part of the congressional body? A. Yes, that is possible.

The Court: All right. I have no further questions.

Mr. Nickerson: You suggested a question to me, your Honor. May I ask it?

The Court: Yes.

Re-cross Examination by Mr. Nickerson:

Q. What is the provision of the law that requires publication of a franchise in the Gazette? What (509) section? A. I would argue two reasons: First, the continuous administrative practice, and, second, a provision in the Law of Civil Aviation, I think Article 64.

Q. Can you give us accurately what that is? Do you have that in your notes? A. Yes, I have it. Article 68.

Q. What does that provide, in substance? A. That the execution of the contract with the executive power and consequently also the renewal o ' said contract.

Q. Does it say "renewal" or are you assuming that? A. That is mine.

Q. You are assuming that? A. Yes.

Q. Yes. Go ahead. A. But I say, since otherwise it would expire, that is to say, it is to be assumed that the renewal must be communicated to the National Congress.

Q. What does it say? A. Article 68.

Q. Yes, go ahead. Will you tell us what it (510) says furt er? A. It has to be communicated to the National Congress.

Q. What provision is there in this contract? Will you refer me to the provision that says— A. I think it is 18, the last provision of the contract. 18, yes, of the franchise.

Q. What does it say? A. It provides that the federal executive power shall communicate the contract to the National Congress.

Q. In the event that a contract is not published in the Gazette or is not communicated, as you say, is it void or is it voidable. Do you understand the distinction between those words? A. Yes.

Q. In other words, would the federal government then have to move in some fashion to end it, or does it automatically become void? Do you get my question? A. Oh yes, very much.

Q. Would you answer it? A. A contract without publication, my answer offhand, is null and void.

Q. You just give that offhand? A. Yes.

(511) Q. You haven't studied it? A. It is very difficult because it is so much the detail that you can't possibly find an answer to this in the law of Venezuela.

Q. Yes. You can't express an opinion on that, is that correct? A. Yes.

Q. Can the Federal Executive, acting through the branch which executed the contract, the Minister of Communications, waive any provision of the contract? Do you understand what I mean by that? A. Yes. In case of violation of the franchise.

Q. In case of the violation of the terms of the contract? A. Yes.

Q. It could waive. And wouldn't the application by the Minister of Communications and the Department of Foreign Relations of Venezuela subsequent to the expiring date of the franchise waive any failure to publish it in the Gazette, in your opinion? A. Will you repeat that question, please?

Mr. Schoenwald: I think the witness is having difficulty with the word "waive."

(512) Q. Do you understand what I mean by the word "waive"? A. To renounce, to abandon, to give up.

The Court: Yes.

Mr. Schoenwald: I think "renounce" means to terminate the contract, in the sense in which you are using it. It ended?

The Witness: To waive, in my understanding, is to have a right—

Q. Not to exercise it? A. Not to exercise it.
Q. Correct. Now will you read the question.

(Question read.)

Mr. Nickerson: I am afraid that was a very poor question, your Honor.

The Court: Rephrase it then.

Q. Wouldn't the application by the Ministry of Communications and the Department of Foreign Relations—wouldn't a request by the Department of Communications and the Department of Foreign Relations to foreign countries for traffic rights in those foreign countries subsequent to the expiring date of the franchise waive a failure to file that franchise in the Gazette? (513) A. Since I think that the publication in the Gazette is necessary, my answer is no.

Q. Are you sure of that? A. What can I say, yes?

Q. Now is there any means by which an American company can become a Venezuelan company for purposes of Article 13 in Venezuelan law? In other words, if they file their documents, their by-laws and their charter in Venezuela, do they not, then, for the purposes of Venezuelan law become a Venezuelan company? Would you know that? A. I have remember there is an article in the Commercial Code saying that a foreign corporation making operations in Venezuela can be considered as having domicile in Venezuela but they will retain the foreign nationality.

Mr. Nickerson: No further questions.

Mr. Schoenwald: Now I do, if your Honor please.

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Re-direct Examination by Mr. Schoenwald:

(516) Q. Mr. DeCervera, have you since last evening had an opportunity to look at the contract between U. S. Overseas Airlines and AVE? A. Yes.

Q. Now with regard to that contract and with regard to the franchise between the Government of Venezuela and AVE that you have before you, and it is 393 for identification, can you tell us whether or not CAVE had a capacity or was able to enter into the (517) contract between U. S. Overseas Airlines and itself in the fashion that you have before you? A. Well, certainly United States Overseas Airlines was able to enter into some contract with CAVE, but this contract could not in any way mean—means a transfer of the rights and obligations granted and assigned to CAVE in the franchise.

Q. Well, will you tell us a little bit more about what you mean? Is there anything which prevented CAVE from entering into this contract? A. Into this contract, yes, into this contract, yes.

Q. Tell us what there was that prevented CAVE from entering into this contract with U. S. Overseas Airlines. A. I have to go back to Article 13 of the franchise. This contract—this clause 13 prohibits something. The question is to what is prohibited under clause 13.

Yesterday the emphasis was put on their participation in the stock, and it is certainly impossible to affirm positively that under clause 13 no share of CAVE can be transferred to United States Overseas Airlines, although it is doubtful because (518) of the ambiguity of the terms of clause 13; the ambiguity is exactly in the last words of the clause "participate in the enterprise."

What does this mean? Participation in the stock or participation in the franchise? The doubt can be raised as to the extension of this phrase to mean prohibition of transferring the stock. It can be assumed for the sake of the argument that the transfer of the stock is not prohibited under clause 13. But in that case what does clause 13 prohibit?

The first question is doubtful but the second one is not doubtful if we have to give some meaning to the words "participate in the franchise," as related with the first phrase of the clause, "The contractor may transfer or assign the rights and obligations appearing in this contract only to a Venezuelan corporation."

Then at the end of the clause "participate in the enterprise," as to the prohibition concerning the stock the doubt arises because if the last phrase does not refer to the franchise—to the stock—I withdraw "franchise" —to the stock, there is a duplication of the prohibition.

The Court: Of what?

(519) The Witness: A duplication to the prohibition.

A. (Continuing) In the clause there are two prohibitions, and the first refers to the franchise. And what about the second? It is a duplication maybe. And in that case I agree it is impossible to positively affirm that the participation in the stock is prohibited. But the participation in the franchise exists. And it does mean that.

"The contractor may transfer and assign the rights and obligations appearing in this contract only to a Venezuelan corporation." According to my understanding in a franchise rights and obligations are assigned to the contractor. To know which those rights and obligations are you naturally have to go to the contract.

The question is, in the second contract between CAVE and USOA, is there any transfer of the rights and obligations granted to CAVE under the administrative contract? If there is any transfer of any right and obligation there is a violation of the franchise.

The point is now to know if actually any right or obligation existing in the contract, in the administrative contract, in favor of CAVE has (520) been transferred to USOA. And after a careful examination my conclusion is that almost all rights and obligations granted to CAVE have been transferred to USOA, almost all of them.

Concretely, I can specify later on, clause 1 has been violated because the rights assigned to CAVE under clause 1 are now in the hands of USOA, a foreign corporation. Clause 2 the same. Clause 3 the same. Clause 4 the same. Clause 5 the same. Clause 6 the same. Clause 7 the same.

Let us consider now clause 8. In clause 8 there are some benefits given to CAVE for importation of material and purchased or fabricated in Venezuela. I would say now that United States O. A. would claim those rights.

Still a violation, not as plain as the others, but a violation in my opinion because certainly USOA would claim the right to import under a preferential treatment. The same with clause 12. Under clause 12 one of the obligations of CAVE was to pay taxes. Well, now, to pay taxes is an obligation of United States Overseas Airlines. A conclusion can be drawn practically that all rights and obligations are today in charge of United States Overseas Airlines. Practically all the clauses of the franchise have (521) been violated. In my opinion CAVE practically today does nothing to share in the benefits.

By the Court:

Q. To say it does nothing, you mean that under this agreement— A. Yes.

Q. —it is called upon to do nothing? A. That is right.

Q. When the agreement is compared with the— A. With the franchise.

Q. —With the franchise provisions? A. That is right. It is a kind of dummy which is in between United States Overseas Airlines and the Venezuelan Government, for asking the government the renewal of the franchise to have a very ambiguous right of supervision to the nomination of employees; nothing very clear, nothing substantial as compared with the rights and obligations actually transferred to the American corporation.

Q. Then the impact of what you say is that this agreement was null and void ab initio? A. Ab initio. And yesterday I was aksed if it was void or voidable. Yes, that is right. I have now found several sections in which the word (522) used is nulidad, that is, a nullity. I can show you in which article the word "nulidad", only the word "nulidad" is used. Article 123, sections 9 and 11 of the Constitution, the word used is always nullidad.

Mr. Nickerson: Excuse me. Your Honor, is that the Constitution of Venezuela?

The Witness: Yes.

The Court: "Yes," he says.

A. The word "nullity" is again used in the organic law, and in common law we say "law" instead of "statute"—of the organic law of the court, the federal court, "Sala Federal y de Casacion."

Q. That is the Supreme Court having competence to deal with constitutional questions; is that right? A. Yes, sir. I would like to add, too, that the performance of the second contract between CAVE and the United States Overseas Airlines is a violation of the franchise.

Q. What do you mean by the second contract? A. Well, there is an administration contract granting the franchise and there is a second contract transferring to the American corporation some rights and obligations included in the franchise.

Mr. Schoenwald: If your Honor please, (523) I think that the witness is referring to the first contract as what we have been calling the franchise and the second contract he is referring to the agreement between USOA and CAVE. Is that correct?

The Witness: Yes.

The Court: Yes. Go ahead.

A. (Continuing) Well, the contract between CAVE and the United States Overseas Airlines is a violation of the franchise, making it null and void, but at the same time it is a violation of the Constitution.

Q. Which would be another reason for its being void? A. Oh, yes. And a very powerful one. Article 49 of the Constitution.

Now if you want—if you ask me to, I can make a review of all the clauses of the franchise and to show you how

it has been a violation of almost all of them in the contract between CAVE and United States Overseas Airlines.

By Mr. Schoenwald:

Q. Could you first tell us why you think that the contract violates the Constitution and then perhaps go to that? (524) A. Yes. Article 49: "No contract of public interest executed with the Federal Government or with the government of the states," and so on, "could be transferred in whole or in part to foreign governments" etc., etc.

At the end of the article: Those contracts cannot be executed either with corporations not legally domiciled in Venezuela nor the transfer to them of the contracts executed with third parties could be admitted.

That is to say, a contract executed with third parties—in our case the third party is CAVE, because the article is making primary reference to a foreign corporation—I repeat: A contract celebrated with third parties, in our case with CAVE, cannot be admitted to be transferred to a foreign corporation.

The Court: Any further questions?

Mr. Schoenwald: Yes. Can you tell us what you understand to be the reason for this constitutional provision and the reason for this provision in the franchise limiting the transfer of the obligations and duties that you have referred to?

A. This is a very general provision that you can find in any legal system. Administration contracts involving concessions or franchise or the use of public (525) goods are considered of public interest. That is to say, not only the parties involved have an interest in them; there is a public interest. And to safeguard this public interest

it is provided that these contracts cannot be executed by foreign corporations. That is the general spirit of all legislation prohibiting foreign corporations to a large—to a larger or smaller extent to participate in franchises, concessions and administration contracts in general.

Q. Can you tell us why is it peculiarly applicable to aviation operations? A. Well, the railroads are definitely and in all times being a question of a public service, transportation by highways the same, transportation by air much more the same. I have a book called Derecho Aeronautical Venezolano. Well, this book is almost entirely dedicated to explain that transportation by air is one of the most—one of the first where the public interest is more relevant. And to explain why, on the ground of this relevancy of the public interest, the regulations are somewhat stringent—strict.

Mr. Schoenwald: That is all. But my adversary may want to cross-examine you.

(526) Mr. Nickerson: Your Honor, do you have the original of the contract?

The Court: Yes.

Mr. Nickerson: May I have it?

(Court hands to Mr. Nickerson.)

Re-cross Examination by Mr. Nickerson:

Q. The contract dated July 25, 1951, between USOA and CAVE has been read in its entirety by you? A. Yes.

Q. And did you read the provision in paragraph 1-K which states that USOA shall abide by all applicable laws and government regulations? A. Well, naturally, yes.

Q. You understood that they were required to abide by them, by whatever Venezuelan law there was in that section of the contract, did you? A. Oh, yes, naturally.

Q. Any obligation that CAVE has under the Defendant's Exhibit BJ, which is the contract with the federal executive dated August 8th, is there any obligation that CAVE has towards the federal government of Venezuela which it has been relieved of by the contract of July 25, 1951? A. Many.

(527) Q. By that do you mean that the federal government of Venezuela could not come against CAVE for a failure to fulfill the contract dated August 8, 1950? A. The federal government certainly can come against CAVE.

The Court: What do you mean by "come against"? You mean recourse in a lawsuit?

Mr. Nickerson: Yes.

The Court: Go ahead.

Mr. Nickerson: Can enforce the provisions of the contract of August 8, 1950.

The Court: On the Venezuelan law.

Mr. Nickerson: On the Venezuelan law.

A. That is to say, the federal government can cancel the franchise and to determine recovery to the extent indicated in article 16, I think.

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(533) Q. In other words, you would say that with respect to matters of major concern, matters of policy, CAVE could not hire someone to perform those functions? A. If you go to those—

Q. Excuse me; let me finish my question because I think it will make more sense.

(Continuing) Couldn't hire a non-Venezuelan company to perform those functions, but as to other functions you think that it could; is that the distinction (534) you are making? A. I am making this distinction in order to admit that you have some right in making a difference be-

tween different situations; there are situations very difficult to grasp and to divide. That is to say, as a matter of tolerance I would say for a matter of minor concern and a broad, although it is strictly against the terms of the franchise, I can go along.

Q. In other words, you would say, if I summarize what you are saying correctly, on matters of major concern or matters of policy or something of that character you would say that CAVE could not transfer? A. Correct. I can—

Q. Whereas, matters which were not of that character it probably could; is that clear? A. The correct way of saying that for me is I can be tolerant as to the first; I cannot be tolerant as to the second.

* * * *

(536) Q. Would you read Section 3-B of Defendant's Exhibit N, right here (indicating). A. (Witness examines). Mainly Section B.

Q. Section 3-B. A. 3-B. Yes. Matters of policy.

Q. You don't need to read it aloud.

The Court: It might be helpful if he did. It is very short.

A. "Matters of policy and questions of major concern relating to the conduct of the operation will be determined and carried out in accordance with properly adopted decisions of the board of directors of CAVE."

Q. Now would you answer his Honor's question, which was: Under Venezuelan law did you consider that language which you have just read and, if so, what conclusion did you come to with respect to it? A. Strictly speaking, this is a violation of the franchise, too, because (537) all questions on matters of policy of either major or minor concern were assigned to CAVE. Apparently

they are trying—they were trying to be tolerating and make a distinction between questions of major concern and minor concern. While the questions of minor concern are not to be determined by the board of directors of CAVE, strictly speaking, reading again article—clause 13 of the franchise, no rights and obligations appearing in this contract can be transferred. No distinction between questions of major or minor concern.

Q. You didn't understand by the contract of July 25, 1951, did you, that USOA had any landing rights or franchise rights transferred to it?

* * *

A. Well, I don't understand. The second—we are speaking now of the second contract.

Q. Yes. The one you have before you. A. Yes. And your question is whether—

Q. My question is did that contract, Defendant's (538) Exhibit N, transfer to USOA any franchise rights or landing rights, that is to say, any right to operate the airline out of Venezuela or to land in foreign countries? Isn't it correct—excuse me. Go ahead. A. As to Venezuela, it is my understanding that it did.

Q. Now USOA under the contract of July 25th did not have any right to go to the Venezuelan Government, did they, and say, "We have a right to fly here or not to fly here"? In other words in relation to the Venezuelan Government didn't CAVE retain the basic right to deal with the Venezuelan Government and to deal with the foreign governments? A. The basic right to deal with the Venezuelan Government, yes.

Q. And under the contract of July 25, 1951, that right was not given to USOA, was it? A. The right to go to the Venezuelan Government—you have used the word "basic" and I agreed because basic—I can go along with the word "basic." I would say, yet, that United States

Overseas Airlines got a right to go to the Venezuelan Government, for example, asking for air privilege to import material under the benefits granted to CAVE under article 9.

(539) Q. Well, CAVE would have to go and ask for that; the Venezuelan Government wouldn't recognize USOA, would they? How could they recognize them in the light of the fact that— A. That is correct, but at the same time—

Q. They wouldn't recognize them— A. At the same time I am sure that United States Overseas Airlines would claim this privilege.

* * *

Re-direct Examination by Mr. Schoenwald:

Q. I direct your attention to paragraph number 1 of the contract between U. S. Overseas Airlines and CAVE. I think you have it there. A. Article No. 1.

Q. Yes. May I help you find it? Won't you look at my copy of it? I direct your attention to article 1 of the contract between U. S. Overseas Airlines and CAVE and ask you to look at the obligations there, flying operations and so on, selling tickets, and to the other obligations that are referred to on the part of USOA, 1 to 3 and the several letters there.

(540) Could these, in the light of the franchise between the Venezuelan Government and CAVE, be assigned to United States Overseas Airlines? A. No. Before I offered to make a review of the clauses of the franchise which, according to me, had been violated and compare them with this second contract. I don't think it is necessary. It will take time. And it is pretty plain. Still, I can do that.

Q. What do you mean that it is pretty plain? A. The

violation. That is to say, the transfer of the rights and obligations granted to CAVE under the franchise.

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(541) Q. Would you have time to be able to prepare an analysis before you leave for Europe of the franchise article by article compared with the contract and indicate its violation? A. Yes.

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(542) The Court: Then as I understand it you are willing that such a memorandum, prepared within the limited scope stated by Mr. Schoenwald, would be admissible as part of the record in lieu of the witness' testimony, that is, if he were called he would testify to that effect, and you are making no concession as to its truth or accuracy.

Mr. Nickerson: I will accede to your Honor's suggestion.

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Albert W. Gotch, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

(543) Direct Examination by Mr. Nickerson:

Q. Mr. Gotch, what is your business? A. I am a consultant in air transportation.

Q. Could you give us some of your educational background and experience? A. Yes. I was graduated from Union College in 1926 and attended a three-year graduate course at Harvard University, between 1926 and 1929, in the Graduate School of City Planning.

For a period of approximately ten years thereafter I practiced as a planning engineer for municipalities in Pennsylvania.

During the course of that practice I engaged in airport design planning, supervision of construction, and in that manner became acquainted with some of the early certificated airline carriers in this country, principally United Airlines and TWA. Both of these carriers asked me to assist them with some of the economic work on which they were engaged in presenting their cases before the Civil Aeronautics Board in which either Certificates of Convenience and Necessity or additions to such certificates were being sought.

In 1940 I devoted my time almost exclusively to that kind of work, most of my time being engaged by (544) United Airlines. It was my assignment to go out to communities for which applications had been filed for service, gather, organize, analyze and present economic data for those communities which would establish a requirement for air service, then present those results in the form of exhibits in hearings before examiners of the Civil Aeronautics Board and testify thereto. I carried on in that manner through 1941, and having been a reserve officer in the Corps of Engineers when World War II broke out, within a very short time I was in uniform. I spent two years with the Corps of Engineers.

Q. What were you doing with them, just briefly? A. Essentially airfield design and airfield construction.

Q. Did you do any traffic forecasting? A. Not for them.

Q. Or traffic reports, rather? A. Not for them. At the end of two years I transferred to the Air Corps, the Air Transport Command, which was the airline of the services, and I did traffic forecasting for them.

Q. In 1946 you formed your own firm of—or you joined with Mr. Crawford in Gotch & Crawford? (545) A. That is right.

Q. That is, in substance do you do the same thing as

you did prior for TWA and United, which you have mentioned? A. Yes; it has been expanded. We have done airport planning additionally.

Q. Yes. Now do you get out any publications, Mr. Gotch? A. Yes. Since 1947 we have published quarterly a service which analyzes the operations of all of the domestic trunkline carriers on a quarterly basis and on an analyzed basis, examining into their revenues, their expenses, their financial condition, comparing the results of each, one with another, and ranking them according to their efficiency. We also make similar analyses of all aircraft types and rank them according to various units of efficiency.

Q. Now do you recall that in the spring of 1951, around May, 1951, you were asked to take on an assignment by Mr. Marshall and Colonel Marcano? A. Yes.

Q. And will you tell us what assignment you were given or you were asked to take on? A. We were told by both Colonel Marcano and (546) Mr. Marshall that they had a problem, they were seeking to procure a contract to assist them in the conduct of the operation of AVE. They themselves did not know clearly what they wanted. They wanted something that they could lay before a prospective contractor which would explain to him what the operation was and what the prospects and potentialities of the operation were. And they gave us a completely free hand in how to set it up and how to present the facts and our conclusions.

Q. You have before you Exhibit 357? A. Yes.

Mr. Nickerson: Does your Honor have one?
The Court: Yes.

Q. That is the report you made, is it? A. Yes.

Q. Was that made on the basis of figures that were furnished you by Colonel Marcano or his office? A. Yes.

Q. And on the basis of what Colonel Marcano told you about it? A. Yes.

Q. You will notice, or you will recall, Mr. Gotch, that the traffic forecasts were made upon the basis of (547) seven months of 1950; is that correct? A. Yes.

Q. Can you tell us why you were determined to select those seven months? A. Yes. AVE of course had begun its operation in January of 1950. As I recall, they were on the order of a schedule a week during the months of January and February. Whether it was weekly or an average of, let us say, four per month I do not recall clearly. But as of approximately March they improved their schedule level to approximately two per month and carried on that schedule level through September.

We were advised by Colonel Marcano that as of about the end of September, because of a number of complications, (1) a shortage of working capital, and (2) an accumulation of maintenance, the latter particularly, they were unable to meet or comply with a firm schedule pattern from there on and that maintenance and schedule operations suffered.

Well, with respect to the first two months, January and February, it is common that any new operation, any new airline operation, has a developmental period of several months before it really can swing into (548) normal operations. And it was clear to us that that had occurred here. For that reason we did not include the months of January and February, and for the reasons as explained to us by Colonel Marcano we did not include the last three months of the year. That left us with a seven-month period during which the schedule of two flights per week developed on the order of one and a half on the average. In other words, that represented what we call schedule performance.

The results of those seven months were reasonably uniform also, and as we examined them they appeared to us, and we concluded, that they were representative of a normal going operation.

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(554) Cross Examination by Mr. Schoenwald:

Q. Now, Mr. Gotch, is it not a fact that a substantial part of your time is occupied as a professional witness both at trials and at Civil Aeronautic Board hearings? A. Yes; I participate in many of them.

Q. Now I direct your attention to page 16 of the prospectus, and you will see in the third paragraph, the last sentence: "The large immigrant passenger backlog should make this readily attainable." With respect to that sentence, was it not your purpose in inserting that sentence to advise the reader that the conditions that you speak of before the necessity for a buildup before passengers—before business became active, are not applicable in this situation? A. No, that was not certainly intended. As (555) with the carriers, with having a strike, the reservoir of traffic remains there but they must go out and rewin it.

Q. What was the purpose of this sentence? To advise the reader that there was in fact a reservoir of passengers there? Was that the purpose of the sentence? A. Yes, that there was a reservoir of passengers.

Q. Is that what you were told by the Colonel? A. Yes. And, of course, we knew it was there during 1950 and during earlier years.

Q. And the principal source of your knowledge as to that matter was from the Colonel? A. Yes.

Q. He didn't tell you that he had received any communications indicating, as a matter of fact, that visas were

not being issued and that the agregado of immigration wasn't present in Europe at that time and that, as a matter of fact, no immigrants were flying, did he? A. No, he didn't tell us that.

Q. Had he told you that, this sentence would not have been inserted, would it? A. Probably not.

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(557) Q. Did the Colonel tell you that there were some accounts receivable in this company other than the pesetas in Spain for which there is a reserve I think on page 6, which were included in the $1,700,000 or in the amount—the accounts receivable in the amount of approximately 500,000 which were either never collected or never existed or were written off as uncollectible?

Mr. Nickerson: I object to the form of the question.

The Court: I will allow Mr. Gotch to answer it if he can understand it.

A. I recall no such conversation.

Q. As a matter of fact, had you received such (558) information, would this second sentence of paragraph—page 2, second numbered paragraph on page 2 been presented in this form?

Mr. Nickerson: Your Honor, I am going to object to this hypothetical question.

The Court: Sustained.

Q. Now, you have had an opportunity, have you not, to look at the notes of Mr. Schindall, the accountant who testified earlier, although you were not here? A. No, I haven't looked at them.

Q. Have you seen his report? A. No.

Q. Have you been advised of the content of his testimony? A. Only very vaguely.

Q. You were here yesterday and last night and part of this morning? A. That is right.

Q. Was this matter discussed with you at all? A. No; it was not.

Mr. Nickerson: Your Honor, I do not think this is proper cross.

The Court: I don't think so either.

(559) Q. Now, did you know Mr. Gotch or did Colonel Marcano advise you that he bought these two airplanes for some $440,000 in 1950? A. No. We knew that he had bought the airplanes but we did not know what he had paid for them.

Q. And you didn't know that he had sold them for a net profit of—net price of $900,000, did you? A. I have been told that since, but I did not know it.

Q. You didn't know it at the time. But that means that there was net non-operating profit, does it not, of some four hundred or five hundred thousand dollars? A. It is clear that if someone pays $400,000 for something and sells it for $500,000, or for $900,000, there is net profit of $500,000, and again—

Q. Is there anything in the material that he showed you which indicated this unusual non-operating figure? A. The only operating results that we looked at were for the year 1950, and the sales of the airplanes hadn't occurred.

Q. Was it your impression when you prepared this prospectus that the profit appearing—the figures (560) appearing on page 6 under the section labeled "capital-profit"—I specially direct your attention to 1950 and 1951, to "profit" during 1950 of 19,000 and the loss during 1951 of $62,000, that these were essentially operating

figures? Was that your impression? A. Frankly, we wouldn't have known without knowing what was back of the figure "loss, 1951, $62,553." We were not furnished the makeup.

Q. Was it your impression—as a matter of fact, were you aware of the fact that these were anything other than operating figures at the time? A. I don't recall that we focused on it. We simply accepted this as the company's estimate of its condition.

Q. You had no knowledge of any non-operating transaction of any significance, is that right? A. Certainly we had a knowledge that he had sold his airplanes and we said so in our report.

Q. You had no knowledge of whether or not there was a significant financial result from that transaction? A. No, we didn't know just what had happened. He said that he had made money and paid off his obligations.

The Court: Mr. Schoenwald, I want to take a short recess.

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(561) Q. Now, did the Colonel tell you that this company was not attempting to fly scheduled operations in 1951? A. It is my recollection that he characterized them as essential charter operations.

Q. Now inasmuch as you tell me that the Colonel characterized them as essential charter operations, can you tell us why on page 5 of the prospectus, you say that they were continued, referring to the third paragraph, they were continued on a charter basis and on page 2 again there is an apparently unqualified assertion that they were on a charter basis? Does that help you to refresh your recollection as to whether or not he said that they were essential on a charter (562) basis or whether he said they

were on a charter basis in 1951? A. You are speaking of a matter of degree now.

Q. Yes. A. And I can't recall it clearly. Obviously, something was said to encourage us to make this statement.

Q. When you were asked on your deposition before trial was it not your impression that he firmly and clearly made it known to you that they were not operating excepting for occasional charters in 1951?

Mr. Nickerson: Your Honor, may I object to this as all irrelevant.

* * *

The Court: You are arguing the testimony of Colonel Marcano. That isn't a proper basis for the questioning of this witness.

* * *

(563) Q. Now the papers that he sent to you or were given to you by Colonel Marcano and John Marshall included 1949 profit and loss statement and balance sheet, did they not? A. I believe they did, yes.

Q. And it included 1950 balance sheet and profit and loss statement, did it not? A. Yes.

Q. And it included the June 15, 1951, statement that was attached to the prospectus? A. Yes. We received that just a few days before we went to press.

Q. So that while you had a profit and loss statement for 1949 and a profit and loss statement for 1950, for 1951 you only had a balance sheet, isn't that (564) right? A. That is right. An estimated balance sheet.

Q. An estimated balance sheet. Now did it occur to you that the absence of the profit and loss statement from the papers that you received was a matter of some significance? A. No.

* * *

Q. When you asked for papers from the Colonel or from John Marshall, you asked them, did you not, for a balance sheet and profit and loss statement for 1949, 1950 and 1951, isn't that right? A. No, I don't think we asked for 1951.

Q. Didn't you ask for May, 1951? A. I believe we asked him for something—I thought you were speaking of the calendar year 1951.

Q. No. Up to May, 1951. A. I think we asked him the most recent balance sheet.

Q. Did you ask him for a profit and loss statement also? (565) A. I don't recall that we did. As a matter of fact, I don't recall that we did.

Q. The balance sheet would have revealed, would it, from what you now know, and as an expert in these matters, the balance sheet would have revealed, would it not, an operating loss of $500,000? I am sorry. The profit and loss statement would have revealed an operating loss of $500,000, would it not? A. As of when?

Q. As of June 15, 1951, for the combined period to April, 1951, going back to January 1, 1950. A. Well, I don't know without examining it.

Q. You know now that there was an operating profit—non-operating profit of some $500,000 on the sale of the airplanes?

The Court: Mr. Schoenwald, you are being repetitious and argumentative, and you are going into irrelevant matters.

Q. Now I draw to your attention the letter of Colonel Marcano on the first page of the prospectus and to the second paragraph, the last phrase, "To make an independent study of our past experience and to evaluate future prospects."

You saw that phrase, did you not, when you prepared—(566) printed this? A. Yes.

Q. Then I draw your attention to your own letter, the first paragraph, last phrase, "an objective appraisal of prospective traffic and revenues." Now did you make an independent study and an objective appraisal of prospective traffic revenues and the other contents in this prospectus?

* * *

Q. Did you make an independent study? A. Yes.

Q. Now did you independently verify or investigate the sentence on page 2, paragraph 2, and page 5, that there was 58,000 operating profit?

* * *

Q. A net operating income of 58,000. A. That was stated on their profit and loss statement.

Mr. Schoenwald: I would like to move that (567) the witness' answer be stricken. I asked him whether or not he made an independent study of whether or not that figure was correct. I don't think the answer is responsive.

The Court: He has already stated that he based this report on information given to him by Colonel Marcano and Mr. Marshall.

Mr. Schoenwald: Well, I would like to know—

The Court: I assume he didn't go to Venezuela, he didn't perform an audit of the books in Venezuela, and he didn't hire Venezuelan legal experts, nor did he conduct studies beyond the information provided by Mr. Marshall and Colonel Marcano. Isn't that so, Mr. Gotch?

The Witness: That is correct.

The Court. Now in view of that testimony, which

is already in the record, these questions are argumentative.

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(568) The Court: I take it, Mr. Gotch, that what you did was to collate and coordinate this information in a way that permitted you to make certain deductions and interpretations, and then you presented them as your study and you made certain projections on the basis of this information for the benefit of giving a reader of your report the benefit of your analysis of what you got from Mr. Marshall and Mr. Marcano; is that substantially true?

The Witness: That is true, yes.

Mr. Schoenwald: Mr. Nickerson, will you concede that these pages came from the files of the defendant?

Mr. Nickerson: Yes.

Q. Now can you tell us by looking at these papers whether or not the defendant was in fact carrying on schedule operations during 1951 and whether or not, as a matter of fact, they were essentially on the same basis as they were conducted during 1950?

Mr. Nickerson: I don't think this is the witness to have this testimony from, your Honor.

The Court: I don't think so either, and it (569) is not proper cross-examination.

Mr. Schoenwald: This witness was introduced as an expert.

The Court: It is not a matter with respect to which he testified on direct.

Mr. Schoenwald: I imagine you are sustaining Mr. Nickerson's objection.

The Court: Let me see those papers a minute.

Mr. Schoenwald: I would like to have all those—well, I don't want to have them all marked in evidence. I think that there is a summary paper, if your Honor please, at the end which shows the operations during 1950 and 1951.

The Court: These are papers that you have already tried to—

Mr. Schoenwald: One of them is, not all of them. Some of them are disbursements for schedules in 1951 and others are flight reports of 1951 which were not previously offered.

The Court: I sustain the objection.

Q. Did Colonel Marcano bring to your attention during the preparation of this prospectus the fact that any part or a substantial part of the expenses of (570) this company involved payments to consular officials, Christmas gifts and other entertainment and expensive presents to officials of the Venezuelan Government? A. We received a profit and loss statement which contained a listing of their expenses by expense category, but what was within each category as a content we didn't know and he did not tell us.

Q. Did the Colonel advise you to prepare this prospectus in such a way as to bring to the attention of the reader the fact that this company was in a precarious and dangerous financial condition? A. No, I don't think that he advised us to do that. Our own analysis suggested that they were in some difficulty.

Q. What was it in your analysis that suggested that they were in some difficulty? A. The fact that they had not a very favorable working capital left, the fact that they had let their maintenance accumulate to a point where it was actually difficult to maintain a profitable operation.

Q. Was it your impression that they had a losing business and that it had been losing in the past? A. I think they had potentially a very good business but they were unable to muster the funds to (571) conduct it and operate it.

Q. Were you endeavoring to describe in the preparation of the prospectus a business which had been an unsuccessful business and which was in danger of continuing to be unsuccessful? A. No, I think our report states that it was a business that was well conducted during most of 1951 and showed a profit.

Q. Was it—

Mr. Nickerson: 1950.

A. 1950.

Q. Was it not your intention to describe in this prospectus a business which had successfully operated in the past and which could successfully operate in the future? A. It was our desire to point out precisely what the facts were—let me finish—and among those facts we wanted to show that this operation had been conducted well, had been able to make a profit, and on the other hand we wanted to be sure to put all operators on notice that the carrier had gotten into difficulty.

Q. The difficulty being what? A. Being lack of working capital and accumulated (572) maintenance essentially.

Q. But you were not putting them on notice with respect to the profit or the profitability of their past operations, were you? A. Well, we pointed out to them—

Q. To the fact that it had been profitable? A. —and we also spelled out in considerable detail what their traffic had been, what their revenues had been, and what we foresaw the revenue potentialities to be and the traffic potentialities. From there on a carrier can take it because he knows

what his own expense levels are and he can tell whether there is a profit or loss in it for him.

Q. When you employed the phrase, describing the seven-month period as the most representative period—

Mr. Nickerson: Where is that? A. I am sorry. I see it, "most representative of normal operations." Page 5.

Q. When you employed the phrase, "This period is considered most representative of normal operations," you didn't then know of the attempt, of any attempt by the defendant to fly during 1951 as a scheduled operation, did you? (573) A. Well, we are back to the question I thought I had answered earlier.

Q. Why don't you just tell me yes or no and make it simple so that we can go on? A. We understood that they were operating essentially charter operations in 1951.

Q. And you didn't know of any operating loss during that period? A. We had no profit and loss statement, so we couldn't know.

Q. And you made no effort to get one? A. We made no effort to get one. I say we didn't; we may have asked for it. But we certainly didn't press for it.

Mr. Schoenwald: That is all.

Mr. Nickerson: May I ask one question, your Honor?

* * *

(576) Re-cross Examination by Mr. Schoenwald:

Q. I notice that there is a phrase here describing the franchise as an open end franchise. Where did you get that phrase from? A. That phrase was our understanding of Colonel Marcano's description of the franchise.

Q. What did he tell you that gave rise to that understanding? A. He told us that so long as he performed the contract it was a going—under the franchise, it was a going franchise.

Q. Did he tell you that the franchise he had had any definite date, terminal date? A. I don't think that we understood it at that time, otherwise I am sure we wouldn't have used this language.

Q. It was your impression that it had no terminal date? (577) A. It was our impression that there was no fixed and terminal date, that it was a continuing arrangement.

Q. It wasn't from year to year? A. Well, I don't know that we got into that, that specific. Perhaps we could have, but we didn't.

Q. Was it your impression that all the information furnished with respect to the income and net operating income and gross figures and the other accounting and earnings data and profit and loss data refer to AVE and its international operations? A. Yes, certainly that we used, that we employed, I am satisfied were the international division of AVE.

Q. Then the profit figures appearing also on page 6, notwithstanding the fact that it says "CAVE" on the top of it, it was your understanding and you prepared this paper in accordance with the understanding that the whole matter referred to the international business of the company? A. Well, when I said the data that we used, I had in mind the data on which our forecast and so forth were based which were confined to international operations. This particular statement reads of course (578) "CAVE" and couldn't be "AVE." Now this is precisely a reproduction of what we received.

Q. You assumed that this was part of AVE when you employed it here, didn't you?

Mr. Nickerson: Your Honor—

A. I don't know what we assumed at that time. We asked for the latest balance sheet. This is what we got. We were under pressure to get this to press and we inserted it, and here it is.

Mr. Schoenwald: Have you got Plaintiff's 3-G? Can you provide us with the original Exhibit 3-G, the paper that was shown to Mr. Cox, to Mr. Gotch, which is a balance sheet on page 6?

Mr. Nickerson: What was it?

Mr. Schoenwald: Exhibit 3-G. This is Exhibit 3-G.

Mr. Nickerson: Yes, go ahead. Here it is. Here is the original.

Q. I ask you to look at that paper and to tell me is that one of the papers that was sent to you by Colonel Marcano or somebody from CAVE or AVE?

Mr. Nickerson: Yes. We will concede it is.

Mr. Schoenwald: All right. I wonder if (579) this can now be marked in evidence.

Mr. Nickerson: Yes. No objection.

Mr. Schoenwald: All right. Perhaps the witness can have it now and you can mark it when he has finished testifying.

Q. Now you note that the figure 4 profit on that paper is consistent with the figure 4 profits on page 6 of the prospectus, do you not? A. Yes, they are consistent.

Q. Do you recall during the examination before trial that I asked you: Do I take it that Plaintiff's Exhibit 3-G only refers to income of the international division; is that right? A. You may have asked that, yes.

Mr. Schoenwald: Well, with your Honor's consent I would like to read—

Mr. Nickerson: At what page?

Mr. Schoenwald: 33.

Mr. Nickerson: Yes. We will concede that he was asked.

Mr. Schoenwald: The answer was "That's what I understood it to be."

The Court: Is that so conceded, Mr. Nickerson?

(580) Mr. Nickerson: Yes, conceded.

Q. I am going on to page 33, "I direct your attention to page 6 of the study. I notice that this is entitled 'CAVE'; is that correct?" A. Yes.

"Q. Was there any circumstance that you can recall which made you shift in this preparation from a description of the income and operations of AVE to CAVE?"

And then some colloquy. And "Read the question."

"(Question read.)

"Referring to page 6 of the study", says Mr. Nickerson.

"Mr. Schoenwald: Yes.

"A. If there is a shift, as you suggest, it occurred only because this document which was furnished us had that title and we reproduced the document, as it was headed. That would be my only explanation."

At the bottom of page 34.

"Q. Was it your understanding at that time, and the time you prepared this study that the income experiences and statement of assets and liabilities of AVE and CAVE could be used interchangeably since the facts true about one were exactly true about the (581) other?"

And I think reading down we come to the witness' answer:

"I recall no other information, no."

Mr. Nickerson: Just a minute. Your Honor, that is not the way it reads. The final question was:

"Did you have any information from anyone other than Marcano about AVE and CAVE, Marcano and Marshall?

"The Witness: I recall no other information, no."

Mr. Schoenwald: All right.

Q. Now had you received any information from Colonel Marcano at the time you prepared this document that the $1,717,000 referred to on page 5 as earnings during 1950 included approximately $69,000 of income that had nothing to do with international operations? A. I recall no such figure or any such information.

Q. Do you recall any information from Colonel Marcano that the $58,000 mentioned on page 2 and on page 3 included income from things other than international operations? A. The same answer.

(582) Mr. Schoenwald: All right. That is all.

Mr. Nickerson: No questions.

The Court: All right. Thank you.

Mr. Schoenwald: If your Honor please, I have one more witness. And may this be marked in evidence? I thought we had already understood that it would be.

The Court: Yes.

(Plaintiff's Exhibit 393 received in evidence.)

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DANIEL C. COX, JR., called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Court: Is this Mr. Cox related to the other Mr. Cox?

Mr. Schoenwald: No, he is not, your Honor, except as his employee or co-employee.

The Court: Just a namesake.

Direct Examination by Mr. Schoenwald:

Q. Mr. Cox, what is your occupation? A. I am employed by United States Overseas (583) Airlines, presently as a vice-president, and my duties are supervisor of maintenance facilities of the company.

Q. How long have you been with the company, Mr. Cox? A. I have been with United States Overseas Airlines since we started the company. Before that I was with Wildwood Aviation Maintenance Corporation.

Q. And have you always been based at Wildwood? A. Wildwood has been considered the home base for me ever since I have been with the company. At times I have to be at other places. I held the position of plant manager at Wildwood since 1951, early part of 1951.

Q. You mean plant manager of U. S. Overseas activities? A. Plant manager of the Wildwood base operations, their maintenance base.

Mr. Schoenwald: Your Honor, I think you are aware of the stipulation dealing with the subject of damages. Is that in your records?

The Court: I had better refresh my recollection on it.

Mr. Schoenwald: I have but one copy. (584) Do you have an extra copy?

Mr. Nickerson: I will give you my own copy, your Honor.

The Court: All right.

Mr. Schoenwald: In case there is any difficulty in finding it we will be glad to stipulate that a copy you furnished the Court will be the same as the one—

Mr. Nickerson: Yes.

Mr. Schoenwald: If your Honor please, in order to examine this witness and be in a position to have your Honor, I think, appreciate the facts, I would briefly refer to the stipulation. May I speak while your Honor is perusing that?

The Court: Yes.

Mr. Schoenwald: Essentially the damage claim of the plaintiff will be that certain specific sums were advanced on the part of the plaintiff pursuant to carrying out this operation for pilot salaries, gas, oil, hotel bills and the things necessary to carry it out. These specific sums advanced are contained within the stipulation before your Honor. I understand the content of the stipulation to be that Herbert Goldberg would have testified that these expenses were (585) actually made, that they were reflected on the books of the company and the general requirement of the regular course of business rule, and that they were made in connection with CAVE operations, which leaves us with two or three areas still to be completed with respect to damages. That is, there is a statement here covering the general overhead of the company during the period of the CAVE contract from July to October 22nd and the apportionment of that overhead to this contract is not entirely the subject of agreement between counsel and myself, the problem being that an ap-

portionment was to be made or attempted to be made on the basis of the number of airplanes which were operated out of Wildwood at that time, there being one airplane claimed being assigned to the defendant's use. And it was understood between counsel and me that one of the purposes of producing Mr. Dan Cox here would be to elicit his testimony dealing with the number of airplanes operating out of the Wildwood base so that that would form a basis of reference for apportioning of the as yet unapportioned amount of overhead at the time. And the other area of agreement that Mr. Nickerson and I reached was that we were making claim for the loss of the use of the (586) aircraft assigned to the AVE operation and we were attempting to place a value on this loss of use, and we stipulated a part of that value in this agreement, namely, that $18,000 per month.

I don't know whether Mr. Nickerson conceded the two and three-month period or whether he wants to adduce evidence. You don't concede that, do you?

Mr. Nickerson: I don't concede that, your Honor. Whatever it shows on the log.

Mr. Schoenwald: Well, we will have to separately—

Mr. Nickerson: It is already in evidence.

Mr. Schoenwald: We are going to have the log book referred to by the witness.

The Court: I think that as to these items it would be very easy for you gentlemen to stipulate what the witness would testify to and present it in the form of schedules.

Mr. Nickerson: I think we have almost completely, your Honor.

The Court: Just as you have with respect to this stipulation.

Mr. Schoenwald: The only items that this witness will testify to, unless counsel will concede that (587) the period began on July 15th and ended October 22nd—July 31st and ended October 22nd, we can dispense with the whole problem.

Mr. Nickerson: No, your Honor. It is July 31st to the date that they pulled it off the run, which I think is September 15th.

The Court: You mean when they sent it to Frankfort?

Mr. Nickerson: Yes, they pulled it off our route and sent it to Frankfort. I think that is in the record.

Mr. Schoenwald: As counsel well knows, and I think will be glad to stipulate, an application was made by the defendant's attorneys in this action to have the planes not registered in the United States registry but continued in the Venezuelan registry and that it was not until October 22nd that we were able to re-register the planes as American planes.

The Court: Why don't you put the figures on both dates so that they will both be in the record?

Mr. Schoenwald: All right.

The Court: You can have the September date as one terminal point and then the re-registration date the other terminal point.

(588) Mr. Schoenwald: All right. The other area in which this witness will testify, I think this statement will greatly reduce the matter of testimony, on the question of not merely the $18,000 per month for the dry lease of the airplane, that is, absent its engine time and air frame time, this wit-

ness will testify as to the cost per hour of engine time, cost per hour of air frame time and the utilization which could have been expected during that period, and there will be no other areas of evidence on damage excepting perhaps to measure the period in which the claimed plane was out of use because we think the rest of it is contained within this stipulation.

Mr. Nickerson: Your Honor, just to clarify it, I certainly would not concede that what they expected by way of profits out of a specific airplane is the measure of damages.

The Court: They are not claiming any loss of profit.

Mr. Schoenwald: We are asking for loss of use plus the funds expended plus other items which are not the subject—

The Court: How do you measure your loss of use save in terms of possible profits?

(589) Mr. Schoenwald: I think that the way we measure our loss of use is in what it would have cost us to obtain an airplane at this time and place from other sources. That is, in order to have a plane at this period we would have had to pay to another source 18,000 a month plus the engine time and air frame time which we would have been expected to put on the plane at that time, and if we had such a plane we would have made a profit. But I think, our adversary could well say the reason you didn't make the profit is because you didn't rent a plane; and why didn't you go out and rent a plane. And what it would have cost us to rent a plane including utilization at that time—

The Court: Let us develop it as we go along, and I think when you get to that point you can ask

whatever questions you think are necessary to protect your interest.

Q. Can you tell us with respect to this stipulation, or your recollection, Mr. Cox, what the general administrative overhead of U. S. Overseas was in September—in the year 1951? A. Well, as I remember, it was one hundred forty-seven odd thousand dollars.

Q. And the figure which you saw in this stipulation (590) is essentially correct? A. Yes; it was taken from the books.

Q. Now how many airplanes were being maintained at the Wildwood base at that time? A. At that time—you are talking of the period of time when the airplane was with AVE or before or—the complete year?

Q. Thank you for correcting me, Mr. Cox. Why don't you tell us during the period running from July 31st to October 22, 1951? How many planes were based at Wildwood? A. Well, from July 31st to October part of the time there were four planes based at Wildwood.

Q. What kind of planes? A. DC-4s and there were also I believe one DC-3 there right in that period—it is hard to remember exactly whether it is one or two; there were some DC-3s which were owned by Ocean Air Tradeways that came to Wildwood from time to time for maintenance. They were under lease to other operators. The United States Overseas Airlines had four aircraft that were maintained at Wildwood.

Q. Is any part of the expense of these DC-3s owned by Ocean Air Tradeways included in the $147,000 (591) figure? A. No, it wouldn't be because the expenses of the DC-3, the maintenance of the DC-3 was handled by a company, Wildwood Aviation Maintenance, and they billed direct to the owners of the DC-3 or contractor—work contractor might ask for on the DC-3; in other words, any work that would be performed on the DC-3 would be billed

to either the people that were owning the aircraft at the time or the people that had leased it, depending on the type work.

Q. Mr. Cox, are you familiar with what the costs per hour of air frame time were in 1951? A. The best example of cost per hour would be the charges per hour that were made by carriers during that time on a lease basis which is supposedly return of cost. During that period the Korean air lift had started and quite a few companies had leased aircraft. And the leases would run a certain price for dry lease and then a cost return on the basis of so much an engine hour for the use of an engine and so much an air frame hour for the use of the air frame, because engine overhaul and air frame overhaul are the large factors in maintenance.

So the figure that was used by the scheduled (592) airlines, some of them at that time, was $15 for the air frame per hour and $5.75 per engine which makes the return cost basis plus the figure of 18,000 for the dry lease of the aircraft.

Q. How many engines are there on a DC-4? A. Four.

Q. What is the total per hour time of these planes, aside from the $18,000 dry figure? A. Well, it would be the total of the 15 plus four times $5.75—it would be 15 plus 23, wouldn't it?

The Court: That $18,000, does that cover any specific period of time?

The Witness: $18,000 at that time was the price that was used on a monthly rental.

Mr. Schoenwald: That is included within the stipulation.

The Witness: And the cost of the engine and air frame on a monthly basis would be determined by the monthly use of the aircraft.

Q. I think that the figure you gave us per hour was $15 and four times $5.75— A. Right.

Q. Which is about $32.50. And can you tell us what the utilization per day or per month during (593) this period could be or would ordinarily be? A. On the type operation that we were engaged in the utilization would be approximately 400 hours a month. That is higher than the average and because of the maximum utilization effort on both the Berlin air lift and the Korean air lift. The average utilization would have been closer to a little better than 300.

Mr. Schoenwald: I want to correct my own arithmetic, Judge. That wasn't 32 or 33 but $38 a month.

The Court: All right.

Q. Is that correct, Mr. Cox? A. Yes.

Q. And the utilization which you could expect during this period was from three hundred to four hundred dollars, 400— A. 400 hours. That would be hours on the airplane a month.

Q. Have you made any investigation to confirm these impressions that you have described about the prices at that time? A. I had the figures checked by the records on file with the Civil Aeronautics Board on the leases.

(594) Q. What particular figures did you have checked? Do you have any notes on them there with you? A. I think I have them in the briefcase. The figures of leases to Pan-American Airways. Pan-American operated quite a few airplanes on the lift for other carriers under a lease arrangement.

Mr. Nickerson: Your Honor, we will concede the $18,000 a month as about right.

Mr. Schoenwald: And the $15 per hour air frame time and the $5.75 per hour for engine time?

Mr. Nickerson: Yes, we will concede it, as Mr. Gotch says.

The Court: Do you want to arrive at some total conclusions based on the two dates now?

Mr. Schoenwald: Well, that is a question of arithmetic which—

The Court: You haven't done it yet. I suggest that you do it during the recess so that we can have specific figures in the record.

Mr. Schoenwald: Yes, your Honor. The only area then open to us is the time that this airplane was out of the use of the United States Overseas Airlines.

Q. And I ask you, Mr. Cox, if you can tell me what this Exhibit 329 in evidence is? (595) A. It is an aircraft log book of the aircraft 90436.

Q. Is that the airplane that was assigned to the CAVE operation?

Mr. Nickerson: Yes, we will concede it is.

A. Yes.

Q. Will you tell us the date at which that airplane was first set aside for utilization in the performance of the CAVE contract? A. July 31st the aircraft was pulled out of service.

Q. What year was that? A. 1951.

Q. Now can you tell us with that book perhaps with the aid of your memory when the airplane was first relicensed by American authorities following that date? A. By this book it was relicensed on 10-18-51.

Q. And when did it first fly again on activities other than CAVE? A. You will have to explain your question a little better.

Q. When was the next commercial flight of that airplane? (596) A. This book doesn't show when the next commercial flight of the airplane was. The book gives the hours of the flights.

Q. When was the next flight of the airplane, other than the Civil Aeronautics inspection flight? A. Other than the inspection flight I would say it would be October 22nd.

Q. Do you know anything about the circumstances of the relicensing of this airplane, that is, the relicensing of it as an American aircraft? A. I know that there had to be permissions granted through Washington for the relicensing of the aircraft. The aircraft was relicensed by one of our men, the mechanic supervising licensing. I know that the aircraft was relicensed through the operation office of the Civil Aeronautics Administration after it had obtained the proper approval from Washington.

Q. Do you know what date that was? A. No, I don't remember. But the date of the licensing is listed in the book.

Q. That was the October date that you gave us? A. Aircraft relicensed, new certificate of air worthiness issued; the time on the aircraft at the time of the relicensing, 928 hours 34 minutes.

(597) Q. What was the date? A. 10-18-51.

Mr. Schoenwald: I would like Mr. Nickerson to produce the documents or in the alternative stipulate that his law firm on behalf of the defendants had forwarded communications to American military authorities and to the Civil Aeronautics Board and/or the Civil Aeronautics authority requesting that this plane not be relicensed and advising such authority that the plane was the property of AVE or CAVE at that time and it should be licensed only under Venezuelan registry.

Mr. Nickerson: May I get those out during lunch, your Honor?

The Court: Yes.

Mr. Schoenwald: Would you, Mr. Nickerson, stipulate that your firm sent that letter on behalf of the defendant and this one (handing)?

Mr. Nickerson: Yes.

Mr. Schoenwald: I would like to have these marked in evidence.

Mr. Nickerson: May I reserve a motion to strike?

The Court: Yes.

(598) (Plaintiff's Exhibit 348 received in evidence.)

The Clerk: Plaintiff's Exhibit 351 previously marked in evidence.

Mr. Schoenwald: If your Honor please, I am going to ask this witness a question other than on damage. I make this statement to orient you in that situation.

The Court: Yes.

Q. The airplane assigned to the CAVE operation was 90436, was it not? A. That is right, sir.

Q. Can you tell us who owned that airplane?

Mr. Nickerson: I object to it as a conclusion.

The Court: Overruled.

A. The aircraft was owned and registered with the Civil Aeronautics Administration by Canamex Corporation.

Mr. Schoenwald: I think that was one of the parties to the contract, your Honor.

Mr. Nickerson: No.

Q. Can you tell us what proportion of that airplane (599) or what proportion of Canamex Corporation was owned by Mr. Cox? A. Canamex Corporation, you say Mr. Cox—

Q. Mr. Ralph Cox. A. There is a junior and senior. The Canamex Corporation was owned, the majority of the stock of the corporation was owned by Mr. Ralph Cox, Sr.

Q. What proportion of the stock did he own? A. I don't know exactly because I don't have the books of the company. I know from working so close with him, Clemett and Webb, Mr. Clemett and Mr. Webb owned a portion of the stock of the company because from my knowledge of the dealings they had purchased approximately half of 50 per cent of the value of the airplane from two men by the name of Clemett and O'Mara.

Q. So that the interest of Mr. Clemett and Mr. Webb in this airplane was about 25 per cent of it? A. Approximately 25 per cent. The actual monetary figure I don't know. In supervising maintenance on this aircraft, both before Clemett and Webb got into the picture, when Mr. O'Mara was representing O'Connor and O'Mara in dealing with O'Mara and both Clemett and Webb I know what happened there: (600) They sold half of what they had in the airplane to Clemett and Webb and half of it to Mr. Cox, Sr. So 25 per cent would be a pretty close guess.

Q. Did Mr. Webb ultimately steal the airplane and did your company have to send the FBI out to get the plane?

Mr. Nickerson: I object to that.

The Court: Sustained. What possible bearing does that have in this case?

Mr. Schoenwald: If your Honor please, there is testimony that Mr. Cox overheard a conversation between Colonel Marcano and Mr. Webb with re-

spect to seizing the bill of sale. There was testimony of Colonel Marcano—

The Court: You mean about that incident of the safe in Wildwood?

Mr. Schoenwald: Yes.

The Court: Is this connected with that incident?

Mr. Schoenwald: This airplane was stolen by the same person who was involved with Colonel Marcano and about taking the bill of sale out of the safe.

The Court: If you can show a connection (601) with the incident in the safe I will allow it. I didn't realize that it was part of the same incident.

Q. Is that the same airplane that Mr. Webb ultimately stole?

Mr. Nickerson: Wait a minute. Your Honor—

The Court: Never mind.

Mr. Nickerson: May we have—

The Court: Don't use the word "steal." We are not trying anybody for stealing here. And it would be inequitable and unfair to attach the term of theft to anybody who is not here to defend himself. Just let the witness describe the incident without characterizing it. And I strike out your references to the term of theft or stealing.

The Witness: This is aircraft 90436.

Mr. Nickerson: May we have the date, your Honor?

(602) Q. Mr. Cox, have you made any computations with respect to the airplane loss of use claim? A. Yes. I made a computation from July 31st to October 22nd which is a total of 83 days.

Q. Tell us about those computations. A. Figuring the $18,000 a month for the use of the aircraft, the rent, and the $15 aircraft overhaul charge and the $23 engine overhaul charge it comes to $38 an hour for the aircraft and engine. On the 400-hour per month utilization rate it would be a monthly charge of $33,200 or $1,106.66 per day and multiplied by the 83 days would be $91,852.78. I also made the computation of 92 days figuring from July 31st through October 31st, the same daily rate comes to $101,812.72.

Q. Did you compute it also to the 18th, the date of actual re-registration? A. No. We can subtract the daily rate if you want to.

Q. What was the daily rate? (603) A. Daily rate $1,106.66.

Q. That includes the dry lease at 18,000 and the engine and airframe time? A. The three items, the rent, $15 aircraft hour and the 5.75 multiplied by four for the engine.

Q. What do you say the daily rate on that basis was? A. $1,106.66.

Q. You were just telling us whether or not that plane was ever taken out of the company's control by Mr. Webb and Mr. Clemett.

* * *

A. Mr. Webb flew the same aircraft, 90436, from Oakland to Brownsville, Texas. I am not sure of the exact date; it was either the first of June or the first couple of days or the last two or three days in May of 1952. The aircraft was not authorized for (604) the flight to Brownsville. The aircraft was under contract to the Air Force for flight from Travis to Tokyo. Mr. Webb—the aircraft at the time he took it was in maintenance with the California Eastern Airways, and he just got in the plane, tried out the engines, and flew it off. The airplane, as far as

we were concerned, was just missing all of a sudden; California Eastern had no good explanation. It was just gone. We reported it to the authorities; and the airplane was found in Brownsville.

Q. Did you eventually recover it? A. And the airplane was recovered. It was in the hands of the court for a few months, and a settlement was made with Mr. Webb and Mr. Clemett for their share of the airplane, and the airplane was returned to the United States Overseas Airlines.

Mr. Schoenwald: That is all of this witness.

Mr. Nickerson: No questions.

The Court: So that you have now answered the question that you were about to answer at one o'clock, when we recessed.

The Witness: Yes, sir.

The Court: Thank you.

(605) (Witness excused.)

* * *

Mr. Schoenwald: I read to you from the deposition of Colonel Marcano on pages 17 and 18. At the bottom of page 17, question 7:

"To your recollection were there any charter flights (606) made from the beginning of January, 1951, until you stopped operations late in April or early in May of 1951? A. I don't think so.

"Q. Whatever flights were made were they flights of common carriage passengers? A. They were."

(Reading from page 899 of the deposition of Colonel Marcano.)

"Do you recall any discussion"—I am sorry. Beginning at the last line of 898.

"Q. Do you recall any discussions of irregularity in the keeping of schedules by AVE in the period of March, 1951? A. No, I don't remember.

"Q. Did it come to your attention that the airline was not keeping its schedules in that period? A. Yes, it missed some schedules.

"Q. As a matter of fact was the airline operating on a schedule basis during this month in March? A. Yes, it was."

* * *

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(607) JORGE MARCANO, resumed.

Direct Examination Continued by Mr. Schoenwald:

Q. Did you ask Mr. Marshall or anybody else to check on the credit situation of U. S. Overseas Airlines, on their financial standing? A. No, I don't remember asking them, him or anybody.

Q. You didn't ask anything about their ability to supply money, did you? A. No, I did not.

Q. Now when you got to Europe and you saw Mr. Burger there, who was the U. S. Overseas man, you got to be friendly with him, didn't you? A. Yes.

Q. And as a matter of fact this is the same Mr. Burger whose conversation with respect to the taking (608) of the airplane you overheard, the taking of the bill of sale, isn't that right? A. Yes.

Q. As a matter of fact even while this suit was pending you had been on very friendly terms with the same Mr. Burger, haven't you? A. Yes; I was friendly with him.

Q. And after you and he left—after he left the employment of U. S. Overseas Airlines on the day—as a matter of fact, he left the employ of U. S. Overseas Airlines

the day after this telephone conversation between you and Mr. Webb with respect to the airplane, isn't that right? A. Yes.

Q. He told you that Mr. Cox had fired him, didn't he, because of this conversation with you about the airplane? A. To my recollection he told me that he had resigned because he wasn't in accordance with Mr. Cox about not continuing operation. That is what he told me.

Q. Did he tell you he was pretty unhappy that Mr. Cox had accused him of being in on the taking of the airplane? (609) A. He never discussed that point.

Q. After he left the company you and he discussed some business transactions together, isn't that right? A. Yes.

Q. Exchanged correspondence with each other in the most friendly character? A. I think he wrote me a letter; I don't remember if I answered him. But I was on friendly terms with him, yes.

Q. As a matter of fact, this was even before he had the deposition taken which relates to the matters in this action, isn't that right? A. That was before. I don't know what time he had his deposition taken. But that was right after—

Q. You were friendly with him in 1951 and 1952, isn't that right? A. I would say 1951. My recollection doesn't go into 1952. I know that for a short period after that we were friendly.

* * *

(610) Mr. Schoenwald: I read from the deposition of Mr. Burger, page 9.

The Court: How do you spell Burger?

Mr. Schoenwald: B-u-r-g-e-r. And the first name I believe, sir, is Fremont, F-r-e-m-o-n-t.

The Court: Go ahead.

Mr. Schoenwald: Page 9.

The Court: He was called by whom?

Mr. Schoenwald: I believe that the defendants requested his deposition be taken.

Mr. Nickerson: Yes. It was the deposition of (611) U. S. Overseas Airlines whom he was then employed by, which was 1953, and I took his deposition.

The Court: Very well. Go ahead.

Mr. Nickerson: But he is now called, as I understand it, for plaintiffs.

Mr. Schoenwald: Page 9, the last paragraph, the last question.

"Q. Can you tell us, in substance, what the discussion was at that meeting, where it was? A. If I remember correctly, it was in Mr. Marshall's home. We went to Mr. Marshall's home in Washington and the discussion was rather general at that time. Mr. Marshall was explaining to us about Colonel Marcano, who he was. He was an outstanding pilot in Venezuela, a man of tremendous political influence.

He told us something about the past operation of AVE and their difficulty had been that the Venezuelans had not been able to operate the airline properly. He brought out one of these reports. They discussed some of the potentialities of it. Those were the general lines of discussion. It was rather general at this time.

"Q. Do you recall whether there was any discussion as to the financial"—

* * *

(613) Mr. Schoenwald (Continuing to read):

"Q. Do you recall whether there was any discussion as to the financial ability of USOA to conduct an operation?

A. No, I don't remember that. I think that there was a discussion between Mr. Marshall and myself concerning our operational ability. My program in this was principally operations, and I think that we touched on that, a little of our background and what we had been doing."

Beginning on page 11:

"Q. Did he say that he had personal knowledge"—And I believe the "he" we can agree refers to Mr. Marshall; is that right?

Mr. Nickerson: Yes.

Mr. Schoenwald (Reading):

"Q. Did he say that he had personal knowledge of the factors which would affect that potentiality? A. Mr. Marshall said that he had known Colonel Marcano for many years, and he, himself, had been in Caracas and he thought that this survey—or what would you term this "Q. Plaintiff's Exhibit 1." Which I believe now is generally referred to as the prospectus.

(614) A. (Continuing)—Plaintiff's Exhibit 1 was a conservative estimate of the potentiality and that these people had never been able to realize out of what they had, the full potentiality of the business and traffic that was available there.

"Q. Do you recall whether Mr. Marshall mentioned that it would require a substantial capital outlay by someone who was going to operate the route for AVE? A. No, I don't recall that."

Page 49.

"Q. You have recently read over Defendant's Exhibit 44, have you not? A. Yes, I have.

"Q. And refreshed your recollection? A. Yes.

"Q. Is that an accurate transcription of what you put on tape on August 24, 1951? A. There are some few errors in it. I pointed them out to Mr. Halpert yesterday."

Then we can perhaps spare the Court's time by agreeing that a few errors relating to two or three words that followed in the text in the next page.

Mr. Nickerson: Yes.

Mr. Schoenwald: At this point I would like (615) to offer in evidence the transcript of that tape, Defendant's Exhibit 44. (To associate)—Will you try to find it so that we can go on with it?

242.

Mr. Nickerson: What page?

Mr. Schoenwald: No. 242 is the exhibit number of the tape recording.

* * *

(620) The Court: Well, I think that that would be a sufficient foundation now. I will note your objection to its receipt and give you the right to move to strike out later, and I will have it marked in evidence.

Mr. Schoenwald: If your Honor please in order to have the accuracy of this clearly established we expected to have, counsel, a request for playing it and we had it replayed and we found a number of minor word changes which I will be glad to give you a copy to inspect or file with the Court—do you have a list of those? It is in the same folder.

(Plaintiff's Exhibit 241 for Identification received in evidence.)

Mr. Schoenwald: You have no objection to my presenting to the Judge any particular word changes? Would you like to see what they were (handing)? That is the result of the playback just a few days ago.

The Court: Why don't you settle that between yourself after we adjourn today and you can advise me of it.

Mr. Schoenwald: Yes.

I read from page 55:

(621) "Q. What did you have to do with respect to landing rights in Rome after you got there? A. We had to make representations to the Italian Government and they would only grant us one right, with the possibility of the second, pending a representation by Alitalia Airlines against the possibility of our obtaining the second landing right.

"Q. When you say 'landing rights,' you mean one a week? A. One a week is what we obtained.

"Q. Whom did you see in the Italian Government? A. All representations made to the Italian Government were made through Mazzolini."

Page 88:

"Q. Did you, through Cover or Botto, have any discussions with respect to commissions? A. Yes.

"Q. Did you at any time say the commissions were too high, too low? A. I said they were too high, many times. There were too many commissions. There were commissions and commissions."

Mr. Nickerson: May I reserve the motion to strike that, your Honor, as not binding?

(622) The Court: Yes.

Mr. Schoenwald (Reading):

"Q. Did you say that you would not pay commissions of more than a certain amount?"

Mr. Nickerson: The same reservation.

The Court: Right.

Mr. Schoenwald: I would be glad to have you take the reservation for the next page and a half so that I will—

Mr. Nickerson: I will object to it, your Honor. What Burger said to them. We were not there.

The Court: What Burger said to whom?

Mr. Nickerson: What he is representing to these agents, that their commissions were too high, as not binding on us.

Mr. Schoenwald: These were questions elicited by the defendant.

Mr. Nickerson: I haven't read from his deposition at all.

Mr. Schoenwald: No, but these were questions which you put to him.

The Court: Burger was in Rome, as I understand it, on behalf of the USOA, was he not?

Mr. Nickerson: Yes.

(623) The Court: And the defendant is objecting to his testifying as to what he said on a prior occasion. Isn't he clearly violating the rules of evidence by doing that? He has no right to make a self-serving statement present, past or future. He can't refer to himself and bring it into the record as though it were a fact, any more than he could make up a conversation now.

Mr. Schoenwald: If your Honor please, I think that the situation is somewhat obscure. Burger

while he was paid by USOA and brought into the transaction by USOA was in fact appearing in Europe as AVE's general manager. And the operation was conducted in—

The Court: I can't follow you there.

Mr. Schoenwald: In the ordinary paper sense the business conducted in Europe was AVE's operation.

The Court: He was an employee of USOA, wasn't he?

Mr. Schoenwald: He was also authorized to do business in the name of AVE because this was AVE's enterprise.

The Court: You are playing with words. He was employed by USOA; the only reason USOA had him in Europe was because USOA signed this agreement with AVE, AVE and Colonel Marcano. How can you say that (624) he was there for—

Mr. Schoenwald: He wasn't there primarily on the interest of AVE but—

The Court: That is a legal quibble. He was there as an employee of USOA which is suing in this case for large damages.

Mr. Schoenwald: I will withdraw that and agree that he was essentially USOA's employee. However, I found that, and really a point in the proceedings, perhaps because this was an action in fraud, that a more liberal view of the hearsay rule was being taken, which liberal view means—

The Court: You are entitled to the same administration of justice whether you cry fraud or, whatever you cry. The point is that you can't make this out to be a kind of case because you put a label on your pleading when you come into court. You have a very serious burden of establishing the es-

sential elements of fraud. I don't think that anything that has happened thus far would justify me in indulging in this liberal practice that you have referred to. We haven't yet determined that we are in hot pursuit of a criminal.

Mr. Schoenwald: Turn to page 176—I am (625) going to defer that and turn to page 192.

"Q. Were AVE's arrangements in Europe, as you found them on your arrival in Rome in August, 1951, such as would virtually assure continued high load factors on all westbound flights on the basis of at least one or two trips per week? A. No."

Mr. Nickerson: May I reserve the right to strike that on the ground that it is a conclusion?

The Court: Yes.

Mr. Schoenwald (Reading):

"Q. What conditions that you found would you say prevented such fact from being true or such statement being true?".

Mr. Nickerson: The same motion.

The Court: Yes. You have a continuing right to move to strike out as to any part of this.

Mr. Nickerson: Yes. I just did not want to waive it, your Honor.

The Court: No, you are not waiving it. Go ahead.

Mr. Schoenwald: Page 193.

"A. Well, there were several factors contributing to that. The initial factor was that from the standpoint (626) of landing rights, we had opposition from Alitalia that would preclude our making more than one trip a week

from Rome, and, secondly, in that we were dependent, especially in the initial phases, on the immigrant traffic, the immigrants were not available, nor could they be processed nor obtained in sufficient numbers to warrant that many trips."

Turning to page 236:

"A. It had been indicated to us on our first trip to Caracas"—

Mr. Nickerson: May we have the question first?
Mr. Schoenwald: Certainly. Page 235.

"Q. Was any agreement entered into concerning the retaining of the services of Mr. Cover for the AVE operation after you arrived in Rome? A. It had been indicated to us on our first visit to Caracas by Colonel Marcano that he desired to have Mr. Cover continue with AVE in Rome and the choice of whether or not we were going to keep Mr. Cover was not entirely in my hands.

"Q. When Colonel Marcano arrived in Rome, did you have discussions with Colonel Marcano about Cover being retained as an employee of AVE? (627) A. Yes."

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(628) JOHN S. RUSSELL, JR., called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Nickerson:

Q. Mr. Russell, are you a member of the firm of Hale, Stimson, Russell & Nickerson? A. I am.

Q. And in September, 1951, were you a member of the firm which was then called Hale, Stimson & Russell? A. I was.

Q. Would you go back in your thinking, if you will, to a meeting in September, on or about a Saturday, September 15th, in the office of the United States Overseas Airlines and will you tell us briefly whether you met anyone from U. S. Overseas Airlines at that time, who was present, and in substance, what was said? A. Yes. I attended a meeting at the offices of U. S. Overseas Airlines first in the morning of that (629) Saturday. There were present with me Colonel Marcano and Mr. Marshall. There was also present Mr. Ralph Cox, Mr. Jones and Mr. Clemett and Captain Burger, and a Mr. Dougherty, an attorney who represented that he was counsel for USOA.

Q. And were you retained by anyone? A. My firm was retained by AVE and Colonel Marcano.

* * *

(632) Q. Now you say you then had a later meeting after lunch. A. We adjourned for lunch.

Q. Will you tell us? A. We reconvened about two o'clock.

Q. Will you tell us what was said at the afternoon meeting and who said it? A. At the afternoon meeting I asked Mr. Cox whether in the interim they had thought of any ways in which this agreement could be brought into operation.

He responded in—rather I have to characterize; Mr. Cox got rather emotional and, rather strong terms—"I told you that we wouldn't fly unless we had full loads."

I then submitted a proposition to the meeting. The proposition was this: I stated that as we interpreted this agreement within the next 90 days there will be approximately $30,000 accruing to Colonel Marcano or to AVE, that we had enough confidence in this operation that we

were prepared to grant, I believe I characterized (633) it as, a moratorium, in any event that we were prepared to forbear collection of that $30,000 for the 90-day period on the condition that USOA match it dollar for dollar, expended $60,000, that is our thirty and their thirty, in developmental expense of the business. I pointed out that Captain Burger had stated in his opinion 60 days was all that was necessary to put the operation on its feet and that we were giving them 90 days. If the end of the 90-day period the operation had not reached a break-even point we were prepared to cancel the obligation to pay the $30,000. If on the other hand the operation at the end of 90 days had reached a break-even point we would then make an adjustment and provide for a payment of the $30,000 over the remainder of the contract since we had established our point.

Mr. Burger said he thought that was an eminently fair idea and that it could be and that it would actually serve the purpose.

I asked Mr. Cox what he thought of the idea. Mr. Cox didn't reply. I had to press Mr. Cox two or three times for an answer.

First he said, "Well, that's a matter for the lawyers."

(634) I said, "No, it is not a matter for the lawyers, it is a matter of policy." Finally I got an accord from Mr. Cox who said that he thought that was all right. He turned to Mr. Dougherty and said to him, "You work up the paper work with Russell."

I then did turn to Dougherty and said that I would be in touch with him Monday morning and we would work out the papers, that I did not think there would be very much to do; the only problem would be about finding a break-even point. We exchanged cards, that is Dougherty and I.

* * *

Q. Now the following day did you have a telephone conversation with Mr. Cox? A. Yes, I did.

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(639) Cross Examination by Mr. Schoenwald:

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(641) When you had this telephone conversation with Mr. Cox on the telephone that you have attempted to tell us about and you noticed this striking change in attitude, did you not go to Colonel Marcano and say that, "There is a striking change, and do you know anything about why this change has taken place in Mr. Cox's attitude?"

Mr. Nickerson: I object to it, your Honor.
The Court: I will allow him to answer.

A. Would you repeat the question, please?

(Question read.)

Q. You may not have used the specific words, but did you report that event in making inquiries about it? A. No, I did not go to Colonel Marcano in that particular matter.

Q. Did you report to him this apparent change in Mr. Cox's attitude? A. I did.

Q. Did he tell you anything at that time about the discussion he had overheard with respect to this taking of this bill of sale? A. He may have at that time, yes.

Q. Now I show you Plaintiff's Exhibit 256 (642) for Identification and ask you if that is not a substantially accurate transcription of part of the telephone conversation that is reported thereon that you had with Mr. Cox? A. That is a substantially accurate portion of the conversation.

Q. Now I think you indicated to us that the conversation closed, in your earlier testimony, with the statement by Mr. Cox that you were to get in touch with his attorney, did you not? A. I think Mr. Cox said that two or three times during the conversation he told me he was afraid of me.

The Court: Of you?

The Witness: Yes. We didn't get along, he said.

Q. Is it not a fact that you told Mr. Cox that you were going to make a complaint to the Civil Aeronautics Board and the War Department and the State Department, etc.? A. I did.

Q. Now as a matter of fact, didn't you make those complaints? A. Yes.

(643) Q. Didn't you ask to have the State Department and the CAB refrain from relicensing this airplane as an American airplane? A. Mr. Schoenwald, I did everything I could to protect our client's rights and to try to knock some sense into Mr. Cox's head.

Q. You know that doesn't answer the question. It may be something you want to put in the record, but that doesn't answer the question. I asked you whether or not you had written to the State Department and the Civil Aeronautics Board and asked them to refrain from relicensing the aircraft as an American aircraft? A. Well, I wrote to I believe the Civil Aeronautics Administration since they would have the jurisdiction. I did communicate, or through Mr. Marshall communicated at my direction with the War Department.

Q. And the State Department too? A. And the State Department too; that is correct.

Q. Did you find out when they finally got the airplane relicensed? A. I didn't hear you.

Q. Did you ascertain when the airplane was finally relicensed? (644) A. I think you are talking about re-registered.

Q. Reregistered. Thank you. A. All right. The aircraft wasn't reregistered for several weeks, but I can't give you the exact date.

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(645) The Court: Mr. Russell, do I understand correctly that your first contact with this matter occurred (646) in September, 1951?

The Witness: My first direct contact, and I am not hedging on that, we were retained in either July or August to clear up and on behalf of AVE to defend and settle a lawsuit that this Mr. Wooten's Near East had brought which we did settle up in a couple of days. And we treated it as a separate item and it was completed and it was all out of the office.

The Court: I was particularly anxious to know whether you took part in the preparation of the agreement of July, 1951, or the negotiations immediately prior to the execution of that contract.

The Witness: No, sir. I never saw that until September 14th, the evening before our meeting in New York.

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(647) JOHN PAGE MARSHALL, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. Nickerson:

Q. Mr. Marshall, are you a member of the Bar of the District of Columbia? A. I am.

Q. And in the spring of 1951 were you retained to represent CAVE and Colonel Marcano in connection with the preparation of Plaintiff's Exhibit 357 which is the Gotch & Crawford study? A. I was.

Q. Did you participate in discussions with Messrs. Gotch & Crawford as to the assignment you wished them to take on? A. I did.

Q. Can you tell us in substance what that assignment was? A. I requested that they undertake the formulation of a statement in terminology conventional to this sort of industry, this industry, which would make it possible for us to discuss the future operation of AVE (648) with qualified airline operators.

Mr. Schoenwald: If your Honor please the conversations of this witness with Gotch & Crawford or other persons not parties to this suit I suggest are hearsay, just as conversations between employees of the defendant and plaintiff are hearsay.

The Court: Conversations between employees of the defendant and the plaintiff are not hearsay.

Mr. Schoenwald: Conversations between employees of the defendant with each other would be hearsay if one employee of the defendant—

The Court: Yes, but you said conversations between employees of the—

Mr. Schoenwald: I meant with groups of the defendants talking to each other and groups of the plaintiff talking to each other.

Mr. Nickerson: This is preliminary.

The Court: I can see nothing prejudicial about this, but in deference to Mr. Schoenwald's wishes would you try, so far as possible, to be very strict about limiting Mr. Marshall to competent testimony.

Mr. Nickerson: Yes. I think this is competent as to what instructions he gave Gotch. It is not hearsay.

(649) Mr. Schoenwald: Isn't that in the nature—

Mr. Nickerson: To show their good faith.

Mr. Schoenwald: We are in no position to challenge this testimony.

Mr. Nickerson: Your Honor, I will—

The Court: You can cross examine Mr. Marshall.

Mr. Schoenwald: Yes, we can, but we can't—

The Court: Mr. Marshall says he gave Gotch & Crawford certain instructions. It has something to do with the relationship between Gotch & Crawford. So in one sense it is helpful to you.

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Q. Now prior to the printing of Plaintiff's Exhibit 357, the study of Gotch & Crawford, did you have any communications from USOA? A. I did.

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(650) A. Subsequent to that and between that date, the 12th, approximately, and approximately the 17th or 18th, I was telephoned by Mr. McCormack, John McCormack, vice-president of the United States Overseas Airlines stationed in Washington. He called for the purpose of requesting a meeting to discuss the operation of AVE's route via United States Overseas Airlines.

I advised Mr. McCormack that a study was being prepared which would outline all of the detail incident to an operation of that kind, that we preferred to wait until that was completed before discussing the matter with anyone.

After that—I am not certain I got all of these calls in order; there were, roughly, four calls during that five or six-day span, and it was Mr. McCormack, Mr. Clement, and Mr. Waters.

Q. Were they to the same general substance as you testified? A. To the same general substance.

Q. Now subsequent to those calls did you have (651) any meeting with anyone from USOA? A. If I might, I have gotten a little mixed on dates. I mentioned June 12th and then the 17th. The 17th was not June 17th; it was July 17th. And there were during that period perhaps a total of three calls from Mr. McCormack occasioned by the fact that we did not have a definitely scheduled time for the report which came out about—the calls actually were between the 12th and the very first part of July.

Q. Yes. Well, now, will you tell us, giving us the date, of your first meeting with anyone from USOA? A. Yes. The first meeting with USOA was on I believe July 18th.

Q. Will you tell us where it took place, who was there and what was said, naming the people, if you can, that said what they did say? A. The meeting was attended by Mr. Cox of United States Overseas Airlines, the president, Mr. Fremont Burger and Mr. McCormack, all of United States Overseas Airlines.

The meeting was held at my home in Washington, wherein my office at that time was located. After general discussions about the nature of and agreeing, (652) query was made, and I believe that it was from Mr. McCormack, I am not absolutely certain as to stating this, but it was, the substance of it was, "What's the deal?"

I asked if they had reviewed the copies of the reports which—the Gotch & Crawford study which had been mailed out. I might say those were mailed out, if I can just give a little background on this because—

Q. When were they mailed out? A. They were mailed out either the very end of June or the very first part of July.

Q. Yes. A. I had talked to Mr. McCormack—

Q. Mailed to USOA? A. Yes. I had talked to Mr. McCormack on three or four occasions before that, anticipating the issue of this report, and he had asked that I send a copy of the report to Mr. Cox at Wildwood, a copy of the report to him, to Mr. McCormack, at Washington National Airport—no, sir, it was a copy of the report to Wildwood was to Mr. Fremont Burger; Mr. Cox's report was to his offices in the Chrysler Building, New York. I did that at the time the report was initially issued. And I heard nothing from Mr. McCormack or anyone from the (653) United States Overseas Airlines for several days thereafter until approximately the 17th when I called Mr. McCormack to inquire as to whether they had ceased their interest in the matter. And Mr. McCormack said they hadn't received—that he had not received a copy of the report and, further, they had heard—had been given to understand that the Flying Tiger Airline had already undertaken a contract covering the operation of this route. I told him that no such contract had been entered into with Flying Tigers Airline and that I would immediately provide him with additional copies of the report. I am not certain; I think I sent copies to Washington National Airport to Mr. McCormack's office by hand; I may have mailed them.

In any event, on the following day, the 18th of July, I received a telephone call from Mr. Cox to ask if the meeting, which I have already referred to, held that afternoon in my house, could be arranged.

So when we went into the discussion on this thing, whoever it was, and I believe it was Mr. McCormack said, "What's the deal?" or words to that effect. I said, "Well, you have the study. Have you been over or digested or read the study?"

And Mr. Burger said, "Yes."

(654) Mr. Cox said, "One thing I am interested in is the matter of landing rights at Bermuda."

Well I said, "Mr. Cox"—Mr. Burger said, "Mr. Cox, that is on page 4." And I said, "Mr. Cox, have you had time to read this report?"

Well he said, "No, not thoroughly."

I said, "Might I suggest that the day begin with complete reading of the report. I have additional copies here." And I did get additional copies for them. I do not recall whether Mr. Burger had a copy. I believe that I recall that Mr. Burger had a copy in his hand at the time. But I got additional copies.

Thereupon some time was spent by Mr. Burger and Mr. Cox going over the report with Mr. Burger assisting Mr. Cox in going through the report. Mr. McCormack nor I read the report. We had both read it. I shouldn't say that. I had read it.

(656) The discussion then turned to a matter of interest (657) in the operation, or at some time during the meeting there were discussions as to the availability of a proprietary position in this operation for USOA. I told them that we had that in mind and I frankly thought it was a healthy thing for the operator to have a direct proprietary interest, and that would be worked out.

Q. Was anything said about the time of resumption of service? A. You are entirely right, sir. That was one of the very preliminary points, that the service of it would have to be undertaken at an early date, that the operation by AVE had been suspended but that we had indications from the Venezuelan authorities that they would not maintain the franchise unless operation was resumed at a reasonably early date or at an early date.

Q. Did Mr. Cox make any comment on that? A. Not at that particular time.

Q. Did he at any time during that meeting? A. I don't think that was at that meeting.

Q. Now was there any discussion of the potential of the operation at that meeting? A. There was very little. I made reference to the fact that there was in being, as mentioned by (658) the report, a substantial movement of immigration traffic to Venezuela, that it was because of the shortage of labor in Venezuela and that that activity was accordingly supported by or promoted by, or words to that effect, the Venezuelan Government; it has government support.

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Q. Did you say anything to them with respect to Colonel Marcano? A. Yes, I did. I told them—

Q. Will you tell us what you said? A. I told them that Colonel Marcano—I used the expression that Colonel Marcano was legendary in Venezuelan aviation circles; that, in addition, he had held the highest posts in Venezuelan aviation; and that I had heard, as a matter of pure hearsay, that he could, if he had wished to, have been president of (658-A) Venezuela; that he was held in very high esteem and he was honored and respected by most at least of the principal people of Venezuela.

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(661) Q. Do you recall at that first meeting, going back to the first meeting, Mr. Marshall, if I may, whether there was any discussion of USOA's estimate of operating costs? A. Yes, there was.

Q. In your telephone call that you have referred to with Mr. Cox, did you have any conversation with respect to his estimated cost? A. Yes.

Q. Will you tell us what that was, please, briefly. A. I suggested to Mr. Cox that the cost figure, the figures representing USOA's cost of operation, that his figures were low. I explained to him that it was none of my business but it seemed to me that he was relying on cost figures,

figures which he would (662) incur in this operation which were underestimated.

Q. After that telephone call did you receive Defendant's Exhibit I, which is the proposal of July 21st? A. I did.

Q. Thereafter, did you make any draft of an agreement? A. Yes, sir. I made a draft of the agreement before this.

Q. Before the July 21st contract? A. Yes.

Q. All right. I show you Defendant's Exhibit L for identification and ask you what that is. A. This is the first draft of the so-called contract.

Q. Do you recall whether you sent a copy of that draft to USOA? A. No, I don't think I sent a copy to them. I telephoned Mr. McCormick on, I believe it was, the 21st of July, to advise him that I had completed a draft and would be available to discuss it with them at their convenience.

Q. And did you discuss the draft with them? A. Yes, I did.

(663) The Court: Are you through with Exhibit I?

Mr. Nickerson: Yes, sir.

The Court: May I see that again, please.

Mr. Nickerson: Yes, sir.

Q. When was that? A. July 24th, I believe, on or about.

Q. Whom did you discuss that with? A. Mr. Burger and Mr. Cox—I beg your pardon—Mr. Burger and Mr. McCormick. I am certain of that. I am not certain that Mr. Cox wasn't there but I don't believe he was.

Q. Where was Defendant's Exhibit L for identification typed? A. In my office at my house.

Mr. Nickerson: I offer that in evidence. While you are looking at it may I go on?

The Court: The counter-proposal referred to in Defendant's Exhibit I has a counter-proposal of Colonel Marcano to USOA—

Mr. Nickerson: No, your Honor. USOA to Colonel Marcano.

The Witness: No. He is right.

Mr. Nickerson: Excuse me. I am sorry.

The Court: In the first paragraph of (664) Defendant's Exhibit I there is a reference to a counter-proposal presented to USOA.

Mr. Nickerson: Yes. Let me ask the witness. May I?

The Court: Is that in evidence yet?

Mr. Nickerson: No. May I ask the witness?

The Court: Yes.

Mr. Nickerson: May I have the exhibit, your Honor?

The Court: Yes. It is the top one.

Q. Do you see the language which his Honor has referred to in the first sentence of Defendant's Exhibit I? A. I do.

Q. Do you know what the reference is to the counter-proposal? A. I do.

Q. Will you tell his Honor what that is. A. That was—the so-called counter-proposal was actually a telephone call from me to Mr. Ralph Cox on or about July 20th.

Q. Yes. Now after—

Mr. Nickerson: Do you have any objection?

Mr. Schoenwald: Yes. There is no indication (665) that the plaintiff saw this.

Mr. Nickerson: He just testified that he discussed it with them.

Mr. Schoenwald: The discussion—

Q. Did they see a copy? A. They did see it.

Mr. Nickerson: I offer it in evidence.

A. They did take copies away with them.

Mr. Schoenwald: No objection.

The Court: All right; and the ones that took Defendant's Exhibit L for identification away with them were whom?

The Witness: Mr. McCormick and Mr. Burger.

(Defendant's Exhibit L for identification received in evidence.)

Q. Thereafter, Mr. Marshall, did you prepare a second draft? A. Following the July, approximately the 24th, meeting, I did.

Q. When was that draft prepared; on the 24th? A. Either the night of the 24th or the morning of the 25th. I am not certain.

Q. Where was that typed? A. In my office at home.

(666) Q. And is Defendant's Exhibit M for identification the first two pages of the second draft? A. Yes, it is. The second draft was not a retyping of the complete agreement; the so-called second draft is actually merely a retyping of the two pages on which changes were made as a result of the July 24th discussion.

Q. Did USOA see a copy of Defendant's Exhibit M? A. They did.

Q. When? A. Just one second. Let me be sure. At a meeting held on July 25th.

Q. And who saw it from USOA? A. Mr. Cox, Mr. Burger and Mr. McCormick.

Mr. Nickerson: I offer in evidence Defendant's Exhibit M.

The Court: Cox, Burger, and who was the other?
The Witness: McCormick.
Mr. Schoenwald: No objection.

(Defendant's Exhibit M for identification received in evidence.)

Q. At the July 25th meeting which you just referred to, did the USOA people ask for any amendment (667) of Defendant's Exhibit M?

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(670) Tell me where Defendant's Exhibit N was typed. A. At my office in my home.

Q. Did you adjourn while it was being retyped? A. We did.

Q. And then did you come back and meet with them again? A. We did meet again.

Q. And did Mr. Cox thereafter ask for any further amendment of the contract? I refer you to paragraph 1(i)— A. There is, if I may, one other change that was made at that first July 25th meeting.

Q. Well, skip that for the moment and tell us about paragraph 1(i), which relates to the option to purchase the two DC-4 aircraft and which has a penciled insertion there initialed. (671) A. That was the other change that was made at that meeting. However, that page was not retyped. It is merely written in because it was a few words and easy to add.

Q. Tell us about that. What was said.

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(672) Q. Will you tell us about the amendment to which you have been referring? What was said with respect to it? A. It pertains to Paragraph 1(i).

The Court: Which one is that, briefly?

Mr. Nickerson: That is the one—

The Witness: That is the option agreement.

Mr. Nickerson: (Continuing) That relates to the option to purchase aircraft.

The Court: Yes. And the words are written in at the end "as defined in this agreement."

Mr. Nickerson: Yes.

The Court: Very well.

A. Mr. Cox said that his reading of that provision as drafted at that time left him with the understanding that—

Mr. Schoenwald: I am going to object. I think that now he is attempting to interpret what the contract means.

The Court: This is prior to its composition in final form?

(673) Mr. Nickerson: Correct.

Mr. Schoenwald: I think that the negotiations prior, in the sense of their relationship to the meaning of the words ultimately appearing in the final draft, are within the scope of the parol evidence rule.

The Court: Oh, no, absolutely not. That is one of the most important things to be gone into for the purpose of understanding what the intention of the parties was. They were in the process of reaching the agreement in its final form, and we are still within the confines of that exploration.

Mr. Schoenwald: All right.

The Court: Go ahead.

A. Mr. Cox said that that provision as drafted up to that time he would interpret to bind him to honor the

option upon expiration of the contract, which is written to cover one year, and that he was not in the business of selling airplanes, that he did not wish to place an obligation upon him or his company to give up the two airplanes at the end of the year should he not decide to continue his participation in the operation. I really think he suggested the words of—

(674) Q. "As defined in this agreement"? A. Those are, I am confident, Mr. Cox's words. So they were added.

Q. Then there is an appendix No. 1 dated July 25, 1951. Will you tell us whether there was any discussion with respect to that.

* * * *

(675) Q. Will you look at Appendix No. 1 attached to Defendant's Exhibit N and tell us briefly whether there were any discussions prior to the formulation of that appendix and what were they. A. This was occasioned at a subsequent meeting—

Q. Yes. A. —which meeting occurred at the transient terminal at Washington National Airport at approximately eight o'clock or shortly thereafter on the evening of July 25, 1951.

Q. Tell us briefly in substance what was said prior to the time that that amendment was made. A. I had rewritten the first two pages of the draft that was considered that afternoon in order to provide a clear copy for execution, and at Mr. Cox's request, met them at Washington National Airport. I gave the contract to Mr. Cox. Also present were Mr. Burger and Mr. McCormick.

Q. What was said with respect to that appendix (676) and who said it? A. Mr. Cox looked the agreement over, began to look it over and then he said, "Incidentally, I note that you have referred to United States Overseas Airlines owning these airplanes. I don't suppose it makes any difference but they are actually owned by Ocean Air Tradeways."

So I said it made a great deal of difference and that the contract would have to be amended accordingly.

Mr. Cox said that they were very anxious to return to Wildwood and wanted to get this matter straightened out, and wasn't there some way that we could do that immediately.

So Mr. Burger, I believe, suggested that we go to United States Overseas Airlines office, which was near the airport, that they had a typewriter, and that he, Mr. Burger, would help out in drafting a change or an amendment.

So we did, and I dictated the appendage which is No. 1, binding Ocean Air Tradeways to this agreement.

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(677) Q. Did any of the USOA personnel in the meetings (678) which you have referred to in your testimony ask or not ask for further time to study the contract or the drafts of the contract? A. No. However, Mr. Cox, at the second meeting, did make some remark—I don't remember exactly what it was, but it recognized the fact that the entire matter had to be handled in a hurry, but that he did not argue with the occasion for it. He did recognize that there was a requirement for fast action.

Q. At the time that the contract, Defendant's Exhibit N, was signed by Mr. Cox, did he have with him a Mr. Senour? A. No. He did at a subsequent meeting but not up to the time that—the time of executing the contract.

The Court: How do you spell Senour?

The Witness: S-e-n-o-u-r.

Q. Will you refer, Mr. Marshall, to certain meetings which you have testified to that took place in the middle of September 1951 and direct your attention to a meeting in United States Overseas Airlines office on Friday, September 14th, if you will.

Will you tell us who was present at that (679) meeting and what was said by the various people there, briefly. A. Those in attendance were Colonel Marcano, Mr. Cox, Mr. Clemett—I think Mr. Clemett—Mr. Webb, Mr. Burger and Mr. Jones and myself.

Q. Tell us briefly what was said by the persons there. A. Colonel Marcano and I went to the meeting held in Mr. Cox's office. We went there and asked—

Q. Just tell us what was said in substance. I am sorry to interrupt your train of thought, but try to direct yourself to just what was said at the meeting. A. The introduction was to the substance. I cannot quote exactly—

Q. Just tell us what was said. A. The substance: "Mr. Cox, what can we do to get this operation really under way and doing the job that we had in mind when we executed the contract?"

And Mr. Cox said that he would not fly any loads that were not full loads and occasionally he said were not—

Q. Any trip? A. Any trip that did not have a full load, (680) and he used intermediary references to self-sustaining trips. He said, "This company will not fly any operation that—any trips that lose money. We don't have that kind of money."

I said, "Well, Mr. Cox, it is—the whole thing was based on"—oh, Mr. Jones said, "This agreement that we have is based on misrepresentations and fraud and we simply aren't going to go along with it."

I said, "Mr. Jones, the only representations that I am aware of were contained in the Gotch & Crawford study. That was the basis of the hold-out to you, and you will find in that study we have operated only one-plane round-trips, none of them on schedule, and you will find in that study numerous references to the fact that there will be a requirement to development this service, to reactivate it and develop the traffic, to establish schedule dependability and to better acceptance of the service."

And Jones said that he didn't care anything about the study. I think he said he had never read it anyway.

I said, "Well, in any event, we have a contractual obligation to reckon with."

(681) Jones said, "Well, we don't think the contract is any good, and we will tear it up."

And there was quite a bit said. It was all more or less to that general effect.

Q. Then how did the meeting break up? A. Mr. Cox stated—I think it only can be characterized as argument with Mr. Jones with regard to the binding effect of the contract, and Mr. Cox said, "Well, you're a lawyer and we aren't. I am not going to argue with you."

He said, "I want to get my lawyers."

I said, "Well, fine, then, I think that is a good thing to do; and let us get together tomorrow."

He said, "All right."

I said—

Q. Did you meet the following day? A. I did.

Q. Can you tell us the substance of that meeting, who was there and what was said?

* * *

(682) At the second meeting, which was convened at approximately ten o'clock the following morning, in addition to those present the day before there was Mr. Russell, John S. Russell, and Mr. Doherty. Mr. Doherty was the attorney for United States Overseas Airlines. Mr. Russell, on that occasion, was representing AVE. Mr. Webb, present the day before, was not present, although I think he came in toward the very end of the day.

Q. Tell us what was said in substance. A. In substance, Mr. Russell said that there was a contract in being, that United States Overseas Airlines was not at liberty to just walk away from it, that the loss of the franchise was a very

serious matter, and we had to see if there wasn't some way to work this thing out.

Mr. Cox said that United States Overseas Airlines couldn't lose money, they were not going to fly losing trips, that they couldn't lose money, they didn't have that money.

Again there was in the nature of an argument between Mr. Russell and Mr. Jones regarding the tearing up of the contract. Mr. Burger several times stated (683) that he had familiarized himself with the potential of the operation and the final and financial requirements for the accomplishment of the operation, that he felt that it was—that it offered very interesting possibilities and that with capital support or money support—a statement to that substance—it could be developed to be a profitable operation.

Mr. Cox went into the question, with Mr. Cox, I think, asking Mr. Burger how much money was required. A figure of $60,000 or thereabouts. Sixty or sixty-five thousand was finally settled on.

Mr. Cox said, "Well, United States Overseas Airlines just doesn't have that kind of money."

I said, "Well, Mr. Cox, that was a misrepresentation on your part, then, because when I inquired about the capital in the first place, you said that you had five DC-4s free and clear and three DC-3s, and you realized that they had a quick sale value over the telephone at that time for well in excess of $3 million"

Mr. Jones said, "Well, if that is the way you want to work it, if you want to buy an airplane, we will sell you an airplane."

I said, "For how much?"

(684) He said, "$750,000."

I don't think I said anything, but if I did, it was to the—

Q. No, don't say what you said, if you did. Tell us what if anything Mr. Russell said. A. Mr. Russell, we were just

leaving for lunch, and Mr. Russell was talking to Mr. Doherty. Then we went to lunch. When we came back, Mr. Russell explained again that the continuation of this franchise was a very extreme consideration, very critical consideration, that we had to continue the operation, that another break in the service or discontinuance would, in all likelihood, be the end of the franchise and it would seem that we should be able to get together on some reasonable basis. He then proposed that there would be a moratorium, I think he called it, of the payments guarantee from USOA to AVE for a period of time, which I recall to have been between 60 and 90 days, during which time the funds would be accumulated and if at the end of the period of time the operation had not reached a break-even point, then that obligation from USOA would be canceled, meaning the guarantees.

Q. Did Mr. Cox agree in principle at the end (685) of the meeting to what Mr. Russell said? A. After considerable discussion he finally did agree in principle and directed that Mr. Russell and Mr. Doherty get together at an early date to work out an agreement to that end.

Q. Subsequent—

Mr. Nickerson: This is my last question, your Honor.

Q. Subsequent to July 25, 1951, did you have any out-of-pocket expenses which you incurred in connection with the AVE operation and prior to September 15th?

Mr. Schoenwald: If your Honor please, I don't understand how the expenses of Mr. Marshall are any matter relevant to this proceeding. I don't think Mr. Marshall is even a plaintiff.

The Court: I don't know yet. But I will reserve to you the right to strike this later.

Q. Well, you did have some out-of-pocket expenses, didn't you? A. Yes.

Q. Which you were going to bill to CAVE, were you not? A. I did bill to CAVE.

(686) Q. Which you did bill to CAVE? A. Yes.

Q. And on this sheet does that show those expenses? A. That would appear to be.

Mr. Nickerson: May I have them marked for identification, your Honor? I will show it to Mr. Schoenwald over the evening.

Mr. Schoenwald: Couldn't we have the original bill? Wouldn't that be the best evidence?

Mr. Nickerson: I don't know whether I have it. If I have it, I will give it to you.

(Marked Defendant's Exhibit X for identification.)

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Mr. Nickerson: May I leave one thought with you or ask you to read one exhibit and that is Defendant's Exhibit BL for identification, which has been identified by Colonel Marcano on his direct—on his cross-examination, and it relates to information which he gave the Ministry about the contract.

(687) Mr. Schoenwald: If your Honor please, I am going to object to the introduction of this document in evidence. I know that it is not being offered at the moment.

Mr. Nickerson: It is being offered.

Mr. Schoenwald: Oh, you are offering it in evidence? Then I am going to object to its being offered in evidence and also would like to bring some comments with respect to it to your Honor's attention.

Mr. Nickerson: Your Honor, may I offer it first?

The Court: Yes. The attached papers, translations or transcripts of the larger paper, in each instance it is the exact text?

Mr. Nickerson: Yes.

The Court: I notice that the signature—

Mr. Nickerson: That is the certification of it—perhaps it wasn't. I should have translated the certification. That is the certification of the officer who certified that it comes out of his files.

The Court: I see.

Mr. Nickerson: Of the Venezuelan Government.

The Court: Marcano Guzman is not the same (688) person?

Mr. Nickerson: No, not the same person at all.

The Court: Very well. What is the objection?

Mr. Schoenwald: May I have the document in my hand?

(Document handed to Mr. Schoenwald.)

Mr. Schoenwald: If your Honor please, this is a letter from the defendant to the Government. There is no indication that this letter was ever sent and certainly none that it was received.

Mr. Nickerson: It is certified as coming from the files of the Ministry.

The Court: There is an authentication attached to it.

Mr. Schoenwald: If your Honor please, even though its receipt perhaps be attested to by the Government, the receipt of the letter is not proof of the Government's consent or approval of the contents. It is in the nature of a self-serving declaration.

The Court: No, it is not. It was a communication sent by the defendant Marcano to the government's Minister of Communications and so (689) acknowledged by them.

Mr. Schoenwald: There is no acknowledgement of receipt but merely an indication that this document is on file in the office of the government.

• • •

The Court: That is a matter for argument later on. It is being offered now as a communication sent to and received by the Ministry of Communications of Venezuela on or about that date. Is that right, Mr. Nickerson?

Mr. Nickerson: Yes, your Honor.

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(690) (Defendant's Exhibit BL for identification received in evidence.)

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(693) Cross Examination by Mr. Schoenwald:

Q. Mr. Marshall, are you one of the attorneys in this action? A. No, I am not.

• • •

Mr. Schoenwald: I think I would like to ask the question of the witness, Mr. Nickerson.

The Court: Well, that is a matter that concerns the attorney, too; since Mr. Marshall has not filed a notice of appearance and has not appeared as the attorney for any of the parties in this action, I think the answer can be given by Mr. Nickerson or by me, and the answer is no.

Q. Mr. Marshall, isn't there an agreement between you and Mr. Nickerson giving you a contingent interest (694) in the proceeds of this case, depending upon its outcome?

Mr. Nickerson: I object to this.

The Court: No. If Mr. Marshall has a contingent interest in the outcome of the case, that may affect his credibility.

Mr. Nickerson: Yes. I withdraw it.

A. Yes, there is.

Q. In addition to the interest in the outcome of the case financially, as an attorney, you or your wife own stock in this company now, don't you? A. My wife does.

Q. Isn't it a fact that part of the stock that you own in the company was received by your wife in consideration of your efforts in connection with the negotiations looking forward to the contract with USOA? A. I believe that is true. They were not looking forward—

Q. To participating in the negotiations with USOA, is that what you want to say? A. Mr. Schoenwald, I believe, to my best recollection, that stock pertained to compensation to me in connection with the sale of the aircraft and (695) consequently had no relationship to U. S. Overseas operation at all.

Q. You knew then, did you, of the substantial non-operating profit made on the sale of the aircraft; is that right? A. I did, yes.

Q. And you knew that that sum was in excess of $500,000, didn't you? A. Yes, sir, I did.

Q. You knew also, did you not, that excepting for the commissions paid, that million dollars was used to pay off the obligations of the company at that time; isn't that right? A. I was so told.

Q. Yes. You understood that there was a gasoline bill of about $160,000 that accumulated for a very long time, that had been paid; is that right? A. I knew there was such a bill.

Q. And there were mortgages on the airplane, and they were paid off with the proceeds? A. Yes, I did.

Q. And bank loans; is that right? A. My understanding was the mortgage and the bank loans were one and the same.

(696) Q. There were several mortgages and several payments to various banks? A. I was not aware of all the details, no.

Q. But you knew that after the million dollars had been received, shortly thereafter, it was all disbursed in the payment of debts or went in the form of commission on the sale of the plane; isn't that right? A. No, Mr. Schoenwald, I had no means of knowing how those moneys were disbursed.

Q. But when you saw the prospectus, I am sure that you looked at the sixth page, the balance sheet, and you didn't see any money left in the account from the sale of the planes, did you? A. I had no knowledge and do not now have any knowledge as to exactly what the assets as reflected in the balance sheet related back to.

Q. The balance sheet itself you did see, didn't you? A. Yes, sir.

• • •

(698) Q. Now, did it occur to you or did you have any knowledge that there had been substantial operating losses of this company in the neighborhood of $500,000? A. I knew that they had not operated at a profit at all times in the past. I had no information as to the amount of the loss, no specifics whatever.

Q. Was it your understanding that their schedule operations were only conducted during 1950? A. No, that was not my understanding.

Q. Well, had you noted in that time the recurrence of the statement that they did not conduct schedule operations excepting during 1950 in this prospectus, in two places? A. Yes, I did.

Mr. Nickerson: Your Honor, I am going to object to all questions on that point because it has already been testified that Mr. Waters was chief of communications during this period, he knew what (699) schedules they had or did not have, and his knowledge is chargeable to USOA and, at any rate, the point is completely irrelevant.

The Court: Yes. I sustain the objection.

• • •

(702) Q. Did you tell Mr. Cox that you knew that the corporation had operated at a profit in the past, despite the fact that they were short on capital because there were some pesetas tied up in Spain and because they had maintenance difficulties? A. I believe that is contained in the Gotch & Crawford study.

Q. Did you reassure him that the company had operated profitably in the past, orally? A. I will say that I did. In fact, I will say at this time that I repeated anything and everything that was in that study.

Q. As a matter of fact, did you tell him that anything in the prospectus was inaccurate? A. I did not.

Q. Was there any discussion on your part of the sentence appearing on page 16 of the prospectus (703) referring to the large immigrant passenger backlog? Was there any talk about that?

Mr. Nickerson: I assume this is discussion with Mr. Cox.

Mr. Schoenwald: Oh, yes, Mr. Cox.

Q. Or Mr. McCormick, Mr. Burger. A. We did have some considerable discussion with regard to the volume of traffic available to move from Europe to Venezuela. Very frankly, I do not recall, never heard the term "back-

log" until after this case was started. I just did not notice it.

Q. You didn't tell him there wasn't a backlog? A. I never used the term "backlog" as such, to my recollection.

Q. Did you name any deadline to Mr. Cox? Did you say, "Now, look here. You had better hurry up; these planes have to be there by the 15th"? A. You have two questions in there.

Q. Answer the first one. Did you name or make any deadline to Mr. Cox and say the planes had to be down there by the 15th? A. I didn't tell Mr. Cox the planes had to be there by the 15th.

Q. Did you tell anybody in USOA that the planes (704) had to be there by the 15th? A. Not until the contract had been—it was just before the contract was executed, July 25th.

Q. I didn't ask you the time that you told him. Did you tell him at any time that the planes had to be down there by August 15th? A. Yes, I did.

Q. Did you know that that wasn't true? A. I did not.

Q. Did you tell him that there was competition for the franchise? A. I did.

Q. Did you know that that wasn't true? A. I did not.

Q. Well, didn't you write to Colonel Marcano on August 4th, "With regard to the August 15th date for reinaugurating AVE's operations, I advised Cox and others that this date must be met, as you had made commitments to your government to that effect. I explained that there is competition for the franchise and that if we failed it might be given to someone else. Now, while this may or may not be exactly the case, we must stick to the story or there is no telling when they will get started"?

(705) I ask you does that refresh your recollection. A. It does indeed, and I was aware of that, as I testified. That statement actually advised Colonel Marcano that we cannot afford to let USOA think that there is any leeway in postponing this 15th date. I couldn't, at the date of writing that letter, know that Colonel Marcano had been instructed by his government, or exactly what the arrangement was. The statement is based on a fact which I disclosed to Mr. Cox in the very beginning of this thing, that any established date must be adhered to because I had been advised that if we did not reactivate the service that the franchise would be placed in jeopardy. My reference in that letter goes to whether it is technically true that the Government has said, "You will start the operation on the 15th or not at all." I couldn't say that.

Q. And the other statement in the letter, "We must stick to the story," that was also what you told the Colonel? A. That is a form of expression, just telling him that if the USOA people—that he must anticipate that they would try to get an extension, that for him (706) to entertain to exert himself to obtain such an extension could be quite contrary to the interest of the company.

Q. Now you didn't tell U. S. Overseas Airlines that this $54,000 of liabilities on page 6 of the prospectus was inaccurate, did you? A. I did not. I recall no discussion of it.

Q. But you knew at the time that the prospectus was circulated to them and at the time the contract was signed that as a matter of fact there was a claim on the part of the Flying Tigers for $45,000 and a claim by Near East Transport for $60,000, didn't you? A. I did not.

Q. As a matter of fact, didn't you participate in the negotiations to settle the claims of Near East and Fly-

ing Tigers for the forty-five and sixty thousand dollars? A. My recollection is that that was after the Flying Tiger thing. I learned of it, I believe, on July 28th, while in Caracas. The Near East transaction—I think you are right; I think that it occurred before, but it had been settled.

Q. When was it settled? A. I don't recall the date.

* * *

(711) Q. The question is, did you at the time of distributing this prospectus know the existence of a $60,000 claim on the part of Near East, of Mr. Wooten, against CAVE, and a claim of Flying Tigers of $45,000 against Colonel Marcano and/or CAVE?

The Court: Hasn't Mr. Marshall partially answered that?

Mr. Schoenwald: Perhaps I forgot that answer.

The Court: Mr. Wooten's claim you want to know about now.

Mr. Schoenwald: Yes.

The Court: Answer that.

A. I knew about the Wooten, which was the same as the Near East claim. I belive they are one and the same. They had been settled, if my recollection is right, before the publication of the Gotch & Crawford study; and I was not aware of any claim from Flying Tigers against AVE until after the contract was executed.

Q. Does this Exhibit 190 for identification refresh your recollection on the date of the settlement (712) of that claim (handing) of the Near East-Wooten claim? A. I am sorry, sir, I can hardly read this. The light is very bad.

Q. Perhaps I can find—

The Court: Can you read it for him?

Mr. Schoenwald: Certainly.

Q. Letter to Colonel Marcano in Venezuela:

"Dear George: Inclosed is a letter from Jack Russell"—

. . .

Q. "Inclosed is a letter from Jack Russell together with attachments. I believe those to be self-explanatory. The main things to arrange expeditiously and with care are (1) the transfer of the lease to Wooten, (2) a final and reliable statement of insurance payments due Secar & Morford and (713) (3) execution and return to me of all copies of:

"a) Release CAVE to Wooten and Near East (four copies);

"b) Release Marcano to Wooten and Near East (four copies);

"c) Settlement agreement (two copies);

"d) Cancellation of agency agreement (two copies)."

The first does not relate to it. This letter is dated August 23, 1951.

A. Yes, Mr. Schoenwald, I recall that letter.

This refers to the accomplishment of actions specified in the settlement agreement, which was arrived at some appreciable time before the study in question was published, according to my best recollection. The settlement agreement provided that certain things would be done, and these are those things.

Q. Do you know the date of the lawsuit by month? A. My recollection is sometime in early May.

The Court: Well, suggest it if you know it.

Mr. Schoenwald: I suggest that the lawsuit (714) was in July and that it was not settled until August 15th. I think that is correct, is it not, Mr. Nickerson?

Mr. Nickerson: We have the agreement here, your Honor. It is dated August 11th. May I show them to the witness?

The Court: If you make that representation we will accept that, subject to any correction by Mr. Schoenwald. Settled August 11th.

The Witness: Actually what I have reference to, Mr. Russell handled the drafting of these papers. The settlement that I refer to was a meeting which I attended here in New York, and it was before—it may have been in early July, that is possible, but I did not do this (indicating) and was not aware of what was going on, except to pass on papers, but the settlement that I refer to, and when it was, it was before this study, was a settlement as arrived at, orally in a meeting in New York between Mr. Russell and an attorney representing Mr. Wooten.

Q. As a matter of fact, you had a pretty good idea that there was a claim or a lien by the Flying Tigers on the stock which Colonel—which CAVE promised to sell to USOA at the time they were (715) negotiating the contract and that, as a matter of fact, you knew at the time you negotiated the contract that unless you could do something to get this lien released or paid off, you would not be able to sign that contract; isn't that right?

Mr. Nickerson: Your Honor, I am going to object to this on the same grounds as I did before, and, of course, his question is bad in form, too.

The Court: Yes. Sustained.

John Page Marshall—For Defendants—Cross.

Q. You knew at the time of the contract that the Flying Tigers had a lien on the Colonel's stock did you not?

Mr. Nickerson: Your Honor, I object on the ground that all of this is perfectly irrelevant.

The Court: Sustained. Besides, isn't it in the record from Colonel Marcano's testimony?

Mr. Nickerson: It is already in the record, whatever the facts are.

Q. Did you send this letter (handing)?

Mr. Nickerson: May I give him the original, your Honor.

The Court: Yes.

A. Yes, I sent that letter.

(716) Mr. Schoenwald: Is yours marked?

Mr. Nickerson: No.

Mr. Schoenwald: I would like to offer the original in evidence.

Mr. Nickerson: Your Honor, I object to it on the same grounds. It is all in the document.

Mr. Schoenwald: I would like to suggest to your Honor that is before the contract was terminated, before the suit, and it contains an admission from an attorney in fact of the defendant.

The Court: What is the admission tht you say it contains?

Mr. Schoenwald: Oh, yes, on page two: "The simple fact is that if the Tigers get the 135 shares of stock our contract with U. S. Overseas Airlines is out. This, in all probability, would mean the end of AVE. That is far too much of a gamble" et cetera, et cetera.

As a matter of fact, I believe that until some date long after the lawsuit between the parties, the Tigers weren't paid and their lien on the stock continued and, therefore, the conclusion of this witness when he wrote that letter, or the fact stated by this witness when he wrote this letter, that the (717) contract with USOA is out, is an admission that they were in breach of their contract with USOA.

The Court: Mr. Marshall's estimate of probabilities and his conjectures with respect to the relationship that might ensue from certain facts which he predicted might happen, I don't think is an admission of anything.

I sustain any objection on the ground that it is not an admission and this admission if allowed in evidence would not have any probative value.

Mark it for identification. You have an exception.

Mr. Schoenwald: I also suggest that it shows a knowledge of the parties at the time they were carrying on their contract with the defendant.

The Court: This is after the contract.

Mr. Schoenwald: That is right, but we allege that after the contract they assumed certain duties described in the contract.

The Court: You have exhaustively examined Colonel Marcano as to that. You have already got it in the record, so to the extent that you want it in for that purpose, it is in the record.

Mr. Schoenwald: All right.

(718) (Plaintiff's Exhibits 39, 41, marked for identification.)

By Mr. Schoenwald:

Q. You thought that the people in U. S. Overseas Airlines were pretty nice people, didn't you, and they were cooperating; isn't that right?

The Court: Are you making him a character witness now?

Mr. Nickerson: I would be glad to have him answer that question as to the date of September 15th.

The Court: But he is not asking him as of September, I suppose. He is asking him before the trouble occurred.

What is the point of asking him that question?

Mr. Schoenwald: This witness has made numerous characterizations in the past about the behavior of the defendant, and I have a document here purporting to show that he thought they were first-rate and very cooperative.

The Court: About the character—

Mr. Schoenwald: Of the plaintiff.

The Court: Of the plaintiff.

(719) Mr. Schoenwald: Yes, sir.

The Court: What difference does it make? How could it help me to decide the issues in this case as to what he thought at any time?

Q. Now you heard the Colonel tell you that he had been a participant, perhaps passive, but a participant in discussions relating to an attempt to steal a bill of sale of the airplane, had you not? I think you can answer that yes or no. A. I would have to have that one read back.

(Question read.)

A. No, I don't think I can answer that yes or no in any fairness to the Colonel.

Q. Then don't answer it. Before the conferences in New York and after the signing of the contract, before the conferences taking place in September, had you heard mention of a theft of the bill of sale of an airplane? A. I had.

Q. Did you report this to Mr. Cox? A. I did not.

Q. From whom had you heard this? A. From Colonel Marcano, Mr. Burger and Mr. Webb.

Q. Where was this? (720) In the Lexington Hotel, in New York City.

Q. Was there a telephone call while you were at the Lexington Hotel to the office of U. S. Overseas Airlines? A. No.

Q. Did you overhear any telephone conversation between Colonel Marcano and Mr. Webb? A. No.

Q. Did you know that there was some difficulty with the franchise of the defendant in this action? A. I did not.

Q. Do you recall writing to the defendant or Colonel Marcano and asking him if the difficulty with the franchise had been cleared up? A. I do not.

Q. Did you tell U. S. Overseas Airlines that they had best not phrase the contract in such a way as to indicate that they were renting the franchise? A. I do not think I said it just that way.

Q. Do you remember what you said about it? A. Mr. Burger used the expression having to do with renting the franchise, and I said I didn't think we wanted to use that expression.

Q. Can you tell us what it was that caused you (721) to say that you didn't want to use the language that the franchise should be rented? A. Because I told him that that would be an unacceptable impression to establish.

Q. Unacceptable impression to establish to whom? A. To the Venezuelan government. It would be an inaccurate impression. We don't rent franchises.

Q. What brought up the subject of discussion that you would rather that they didn't use the expression "rent the franchise"? A. I believe that had to do with the matter of division of profits after the revenues had reached a figure of two twenty-five a mile.

Q. With respect to whether or not you remembered any difficulty over the franchise, does this document show—well, let me ask you this:

I read to you from a letter of August 15, 1951, addressed to Colonel Marcano, the first sentence:

"I hope that by the time this reaches you the franchise situation will have cleared up." A. You say does that refresh my recollection?

Q. Yes. A. Well, there were little complications of (722) course throughout this thing, as there are in any business of this nature. I recall nothing that indicated to me that the franchise was in a critical condition. I think there was a matter of renewal of the franchise. The franchise situation; I can't quite agree with your paraphrasing of these things into problems.

Q. You knew there was some difficulty with the franchise at the time the negotiations were in progress; isn't that correct? A. I knew that he had the matter of reestablishing his position with the Venezuelan government, that they had taken the position that unless the operation was reestablished, reactivated expeditiously, that the franchise would perhaps be in jeopardy.

Q. You spoke of the renewal of the franchise.

Mr. Nickerson: Let him finish his answer.

Q. I am sorry. I thought he had. A. I was going to answer your next question.

I was going to say that after that it was about that time that I learned that there was a renewal to be effected.

John Paye Marshall—For Defendants—Cross.

Q. Were you the author of the phrase in the prospectus "an open-end franchise"? (723) A. I couldn't claim authorship of any phrase in the prospectus.

Q. What was told to you about the meaning of the phrase "open-end franchise? A. "Open-end franchise" I think I understand the meaning in at least the aviation industry is a franchise which is for an indefinite period of time, that is, there is no termination date.

Q. But apparently you knew that the franchise needed to be renewed, so that that description was inaccurate; isn't that right? A. I didn't know that until some time a little later. Frankly, I did not dwell on that anyway, and I still consider it an open-end franchise in effect.

Mr. Schoenwald: I move that the last be stricken.

The Court: No. I will allow it.

What is the correlative term of "open-end franchise"? I don't understand this jargon of people in the aviation business as well as I should perhaps. Does an open-end franchise constitute a form of franchise which is contrasted to some other type of franchise?

The Witness: Yes, sir.

(724) The Court: What is the other type?

The Witness: My understanding is that the other type is a contract which is established to expire as of a given date, which is ordinarily referred to as a temporary franchise, a franchise for a temporary period of time, and the other is a franchise which, by its terms, says that it is permanent.

The Court: All right. One is in its nature essentially a temporary franchise.

The Witness: Yes.

The Court: And the open-end essentially is permanent.

The Witness: Permanent, stated to be permanent. An open-end franchise, I understand, is one which does not specify a terminal date nor does it say that it is permanent. It is open-end timewise.

The Court: I see. Excuse me, Mr. Schoenwald.

Mr. Schoenwald: Thank you.

Q. Can you tell us whether or not it was you or Mr. Burger who made reference to the importance from time to time throughout the negotiations of not showing in the contract between USOA and CAVE that (725) the franchise was being rented?

Mr. Nickerson: I object to the form of that question.

The Court: Read it.

(Question read.)

The Court: I will allow it if Mr. Marshall can answer it; if he cannot or wishes it to be rephrased I will permit him to so request.

The Witness: I would appreciate it if he would rephrase it.

Q. Was it you or Mr. Burger who from time to time said during the course of the negotiations leading to the contract, "Don't phrase the contract or don't use the phrase which suggests that the franchise is being rented"?

Mr. Nickerson: Your Honor, I think we have been over that.

The Court: So far as Mr. Marshall's connection with that term is concerned, he has already sufficiently testified, so your question will have to eliminate references to him. You may ask him whether he overheard Mr. Burger at any time prior to the contract make any comments with respect to the

phrase "franchise rental" or "rental of the franchise" (726) and if so, what the comments were.

Q. I will be glad to have you accept the Judge's question.

The Court: Can you answer that?

The Witness: Yes.

A. Mr. Burger did mention, and I mentioned also, as I have already testified, the term "rental of the franchise"; it was not a repeated reference. Mr. Burger's statement was that—I brought it up first and, as I have said, I think that was in connection with the division of profits. Later on Mr. Burger mentioned the rental of the franchise. My best recollection is that it had to do with the degree of control to be exercised by the Board of Directors of CAVE.

Q. You had some conversations with Mr. Cox and Mr. Burger, did you not, in which you told them some of the essential terms would have to be in that contract; isn't that right? A. To the degree that I told him that two DC-4s would be required. I told him that the operation would have to be activated in the very immediate future. I told him it would have to be established as a schedule operation.

(727) Q. And is that all that you told them that ultimately became part of the contract? A. I think I told him the operation would have to be so conducted as to be a credit to the Venezuelan flag.

Q. Whose idea was it to take an option to buy the airplanes? Did they want you to have that option and say, "We want you to have that airplane option"? Is that the way that developed? A. No, that was my proposal, I believe.

Q. Whose idea was it that the Colonel should have veto power over all of the employees of the company?

A. That was mine. But these were not proposals as to how USOA was to prepare their contract. These things you are talking about came into subsequent drafts of the contract by me or such drafting of the contract.

Q. Was it USOA's idea that you—that they wanted to guarantee you this $3,000 every week? That was their idea, too? A. Their idea is stated in the letter of July 19th and I didn't say—I didn't care whether they said guarantee or not.

(728) Q. I am asking you where the origin of this guarantee to you of $3,000 a week came from. Was that something they were recommending? A. I don't remember. They had the term $3,000 a week in their proposal. I couldn't be sure whether I had a guarantee or not.

The Court: With respect to this right to purchase the two airplanes, was it the purpose of the parties that in the event USOA relinquished the operation for any reason that CAVE should be in a position to continue the operation with those planes?

The Witness: That was the purpose of that. That was the only purpose of that.

The Court: So as to be able to maintain the franchise operation?

The Witness: That is right, sir. We were caught in an argument, your Honor, about whether that would apply to the—what would happen in the event that they decided not to continue after the end of the year provided by the contract. We didn't want to be left this way in there but they wouldn't go along with an option for a period longer than the contract, so it was agreed we would renegotiate the contract or (729) they give—or give a notice or endeavor to give us notice at the end of five

months as to whether he intended to renew the contract after that period and that we would have on that basis time to determine what could be done to get our equipment.

The Court: But during the contract period the purpose of the parties was to enable CAVE to obtain two planes for franchise operation?

The Witness: Yes, that was it.

The Court: That was the purpose of it?

The Witness: Yes, sir.

Q. During those early negotiations it was you, was it not, who insisted that the airplanes had to be registered in Venezuela; isn't that right? A. That was my understanding. It was a requirement of Venezuelan law. Mr. Cox asked that they not be registered there and I had to verify the fact that it was a requirement of the Venezuelan law.

Q. You did give a bill of sale back to U. S. Overseas Airlines, didn't you, for these airplanes? A. In trust.

Q. You gave them the bill of sale back; is that right? A. I gave them a bill of sale which reassigned (730) the aircraft to them. It was given to them in trust and was not to be registered or filed except in accordance with the terms of the contract.

Q. Do you have a copy of that trust agreement? A. There was no written trust agreement.

Q. There was no written agreement? A. There was no written trust agreement.

Q. Who was the author of the provision or who developed the idea that U. S. Overseas Airlines was to have an option to purchase stock? Was that your idea or was that U. S. Overseas Airlines' idea? A. I think it was USOA's idea.

Q. Did they indicate why they wanted that stock? Did

they tell you why they thought it was desirable to have some stock? A. I don't recall. I don't know that it needed any indication.

Q. Did they suggest to you it was a matter of some importance to them? A. My recollection is that I agreed with the suggestion; they wanted to know about stock interest, as I recall it.

Q. Did they suggest that it was a matter of some importance to them? (731) A. They could have; I don't recall exactly.

Q. Did you tell them that you could deliver 25 percent of the stock? A. I am certain I did.

Q. When you told them that you could deliver 25 percent of the stock, did you know that the Colonel didn't have 25 percent of the stock free to deliver, consistent with the requirements of Venezuelan law?

Mr. Nickerson: I object to that, your Honor.
The Court: Sustained.

Q. Now you have seen these notes before, haven't you? I show you Plaintiff's Exhibit 360 for identification. A. Yes, sir.

Q. Whose notes are those? A. I understand they are Mr. Ralph Cox's notes.

Q. They were made after a conference with you, were they not? A. Telephone conversation.

Q. Telephone conference. A. I understand that is true.

Q. And the things appearing on those notes are (732) largely notes made from suggestions of yourself; isn't that right?

Mr. Nickerson: Your Honor, now he is asking him to testify about someone else's notes that were made on the telephone.

The Court: Yes.

Mr. Nickerson: When he was not there.

The Court: I sustain the objection.

Q. If you examine those notes can you tell us which of the items appearing on there were the ideas you communicated to Mr. Cox?

Mr. Nickerson: I can't understand the relevancy of any of this, your Honor, and I am going to object to it.

The Court: Sustained.

Are you trying to put this into evidence? Is that what you are trying to do? Or are you trying to refresh Mr. Marshall's recollection?

Mr. Schoenwald: I would like him to tell us perhaps from the refreshment of his recollection or perhaps I can refresh his memory, who it was that conceived the terms of this agreement. That was the subject of considerable examination of Mr. Marshall on direct examination.

(733) The Court: It has already been brought out from his testimony and everybody else that it was the joint—the result of joint thinking and discussion of a number of persons.

Mr. Schoenwald: I thought I recollected that Mr. Cox had testified that, by and large, most of the terms in the agreement were drafted and suggested and set forth by Mr. Marshall.

The Court: If you believe that that is so, then put your question to Mr. Marshall; then, if he says it is not, ask him whether this helps him to refresh his recollection and would lead him to change his answer, and then that is the end of it. You have just about two questions to ask.

Q. I think that the Judge has suggested the answer which I would like to have from you, Mr. Marshall.

The Court: Do you recall that most of the terms and conditions—

The Witness: I think I can answer.

The Court: —of the agreement were your ideas and were suggested by you?

The Witness: No, sir, they were not.

The Court: Having looked at these notes made (734) by Mr. Cox represented by Plaintiff's Exhibit 360 for identification, would they refresh your recollection and lead you to change your answer to any extent? A. No, sir, not at all.

Q. Did you tell Mr. Cox that the prospectus was a conservative estimate of the situation? A. Yes, I did.

Mr. Schoenwald: All right, sir. That is all.

Mr. Nickerson: One question, your Honor.

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(738) Re-cross Examination by Mr. Schoenwald:

Q. Apparently when you went up there to the meeting in Mr. Cox's office, you and Colonel Marcano and Mr. Burger and Mr. Webb all had had this meeting in the hotel room, and you all knew about this plan to take the bill of sale of the airplane for the purpose of using it on the AVE operation, and not one of the four of you, Burger, Webb, yourself or Colonel Marcano, told Mr. Cox at that time that you were contemplating or that some of you were contemplating a taking of the bill of sale and putting it over on the AVE operation.

Mr. Nickerson: Your Honor, I object to that.

(739) The Court: Yes.

Mr. Nickerson: On several grounds.

The Court: It is clearly argumentative, and I sustain the objection.

Q. Did you learn from Mr. Cox that the reason he diverted the airplane to Frankfort was because he feared its being taken? A. You say did he tell me?

Q. Did you learn from Mr. Cox that the reason he diverted that aircraft to Frankfort was because he feared its being taken? A. I think I read that in the deposition.

Q. Didn't you hear him say it when you later on asked him why—didn't you speak to him and say, "Why did you send this plane to Frankfort?" A. Only on the telephone. He wouldn't admit to me that he had sent it to Frankfort.

Q. But did he suggest to you that he was very frightened because there was an effort made to take his airplane? A. He may have; I don't recall.

* * *

(740) I read from the deposition of Mr. Burger, page 10:

"Q. Do you recall whether there was any discussion as to the financial ability of USOA to conduct an operation? (740a) A. No, I don't remember that. I think there was a discussion between Mr. Marshall and myself concerning our operational ability. My program in this was principally operations, and I think that we touched on that, a little of our background and what we had been doing."

Mr. Nickerson: Excuse me, your Honor.

May the record show that at the time his deposition was taken he was employed by USOA.

The Court: Yes.

Mr. Schoenwald: Page 57:

"Q. You made or had Mazzolini (Tomassini) make representations with respect to that, did you not?"

I believe that should be corrected to read Tomassini; isn't that right?

Mr. Nickerson: Yes.

Mr. Schoenwald: It should be Tomassini, is that right?

Mr. Nickerson: Yes.

Mr. Schoenwald: (Reading.)

"Q. You made or had Tomassini make representations with respect to that, did you not? A. Yes, we did.

"Q. What was the result of his representations? (741) A. We were granted one flight per week, pending the representations for the second flight of Alitalia to the Italian Government, for immigrant traffic only. That was the first arangement that we had, subject to our placing on deposit 1,5000,000 (5,000,000) lire with the immigration authorities."

Skipping down to the bottom of the page:

"Q. Did you understand from Tomassini that those landing rights of only one per week, rather than two per week, were as a result of Alitalia's objections?"

Mr. Nickerson: I object to what he understood from Tomassini. That was his own employee.

The Court: Yes. Sustained.

Mr. Schoenwald: If your Honor please, Tomassini is the person who has been reported in all of these proceedings as the employee of the defendant,

as the general representative of the defendant in Europe. Tomassini is this gentleman who was one of the Venezuelan counsel or ambassador, and this is no employee—

Mr. Nickerson: He was then employed, and the record will show it, your Honor, he was then employed by USOA.

(742) Mr. Schoenwald: This is the same—

The Court: You mean under this arrangement whereby USOA was to avail itself of the terminal facilities of CAVE theretofore existing?

Mr. Nickerson: There was no such arrangement, your Honor. He had traffic people over there.

The Court: Who?

Mr. Nickerson: Colonel Marcano, who were on an agency basis, and he had people over in the office, and as he has testified, he told them that they could employ or not employ anyone that they wanted to, of those people. He did not require them to employ a single one of them, and in fact they were not employed by Colonel Marcano at all, they were employed by USOA.

The Court: They were independent contractors, available to either side.

Mr. Nickerson: Certainly, sir.

Mr. Schoenwald: If your Honor please, I think that this is a most technical objection. I perhaps was guilty of suggesting at one time that Mr. Burger was the employee of AVE because he repreesnted AVE, and when your Honor suggested to me that as a matter of fact his principal interest was the interest (743) of USOA, I agreed that that was so. I think that now counsel is doing the same thing that I may have been guilty of. Tomassini is part of this staff that was made available to the

defendant, worked with them for years. The only people he had in Europe were Mr. Burger and Mr. Van Boheman to help him, and possibly a question of Mr. Waters. We had no control or effective relationship over these people.

The Court: Well, neither did they. While it is true that these people may have had a long continuing relationship, nevertheless the relationship is not of employer and employee.

Mr. Schoenwald: I think that the documents in evidence show that these people continued to report to Colonel Marcano exclusively.

Mr. Nickerson: Colonel Marcano tells me that he did pay him at that time, and so I will withdraw my objection. I am sorry, your Honor, my understanding was wrong.

The Court: All right. You withdraw the objection.

Mr. Schoenwald: Page 57:

"Q. Did you understand from Tomassini that those landing rights of only one per week, rather than (744) two per week, were as a result of Alitalia's objections? A. Yes, I understood that was so, because the agreement, the air agreement between Italy and Venezuela was based on reciprocity and Alitalia had only one flight to Caracas per week, where AVE had two.

"Q. When was it that you first obtained your uplift rights to take out immigrants? A. We obtained those uplift rights approximately the 3rd of September.

"Q. When was it that you obtained your landing rights, one a week? A. We obtained the landing rights prior to the 3rd of September."

Page 182:

"Q. Let me ask the question. Having read that paragraph, was there anything that Mr. Marshall told you in either of the conferences in Washington in July, 1951, when you were present, as to what load factor could be expected from the beginning of the operation for the westbound flights? A. Mr. Marshall told us that we could expect a maximum load factor on our westbound flights due to (745) the immigration traffic.

"Q. Did he give you any reason or did he state any reason why you would have the maximum load factor from the beginning? A. Mr. Marshall indicated that due to the fact that the old AVE operation had been suspended, there would be a backlog of immigrants waiting to go to Caracas, Venezuela.

"Q. Did Mr. Marshall state to you anything that would indicate that this backlog of immigrants would not be available to be actual paying passengers from the beginning of the operation? A. It's a little involved, Mr. Halpert."

Who was the preceding attorney to myself.

(Reading)

"Q. Did Mr. Marshall indicate to you that there was in existence any factual situation in Rome that would prevent this backload of passengers or, I should say, backload of immigrants actually obtaining their tickets and booking passage on the aircraft from the first flight? A. No, he didn't indicate."

Pages 201 and 202:

"Q. Did Mr. Marshall make any statement or comment

(746) about the picture painted by Plaintiff's Exhibit 1 of the prospects of the AVE route?"

I think we can understand that Plaintiffs' Exhibit 1 there referred to is the same as the prospectus we have been referring to throughout.

Mr. Nickerson: Yes.

Mr. Schoenwald (Reading): "

"A. Mr. Marshall was very optimistic.

"Q. Did he make a statement? A. Yes.

"Q. What was that statement? A. Mr. Marshall said that that would be a conservative estimate as outlined in this brochure, Exhibit 1.

"Q. Did he say anything further on that subject matter? A. Not directly to me. He was discussing it with Mr. Cox and Mr. McCormick.

"Q. Anything that you heard, even though it wasn't directed to you? A. Well, in substance, Mr. Marshall was optimistic about the outlook of the AVE picture. He pointed out to us that the operation had been suspended for a period of five months; there would be a backlog (747) of immigration traffic in Rome"—

Mr. Nickerson: "' . . . that there should be."

Mr. Schoenwald (Reading):

". . . that there should be a backlog of immigration traffic in Rome and that we should be able to start out with a maximum load factor on our westbound trips, and our big problem was going to be eastbound traffic. That was the thing that we were going to have to worry about."

Pages 206 and 207:

"Q. Yes, this is it (handing to witness).

"Did Mr. Marshall, in any of these conferences in which you participated prior to the entry into Defendants' Exhibit 13, tell you"—

Which we understand to be the contract, is that right, between the parties?

Mr. Nickerson: Yes.

Mr. Schoenwald (Reading):

". . . tell you of any difficulties which might be encountered in Rome in the development of the immigrant traffic? A. No, Mr. Marshall didn't tell us of any of the difficulties."

Going down to the bottom of page 207:

(748) "Q. Could you tell us what that discussion was, at which meeting it took place, if possible, and what was said by Mr. Marshall or any one of the other persons present? A. I believe that it was at our first meeting with Mr. Marshall. Mr. Marshall told us that AVE had an office in Rome that was right next door to TWA.

"Q. Anything else? A. No.

"Q. Did he tell you that AVE did not have control over the use of that office? A. No.

"Q. Did he tell you that a Mr. Jim Wooten had any connection with AVE's use of that office? A. No.

"Q. Was Mr. Wooten's name mentioned in any way in relation to the Rome office? A. No."

Page 159: Perhaps we can save the Court's time by agreeing that in the record at pages 206, 119, 192, 193 to 218 of the deposition of Mr. Burger, all of which are to the effect that Mr. Marshall repeatedly represented that there would be full loads of passengers in Europe going westbound, that there was no doubt that (749) they would have tickets sold—

Mr. Nickerson: What are your pages?

Mr. Schoenwald: My pages are in addition to the pages I have read, pages 159, 192, 193.

Mr. Nickerson: Wait a minute. 159.

Mr. Schoenwald: 192, 193.

Mr. Nickerson: Wait a minute now.

Mr. Schoenwald: Sorry. 218.

Mr. Nickerson: Your Honor, this is confused in my mind. I am sorry. There were some questions and answers running over to—what do you want marked here?

Mr. Schoenwald: Page 218.

Mr. Nickerson: No. All of 159? Why don't you mark on here what you want, on mine?

Mr. Schoenwald: I didn't want to keep the Court waiting while I marked it. If you like, I will read in page 218 and we won't have to have any delay over it.

Starting on page 217—

Mr. Nickerson: You know, your Honor, I am agreed to let—I don't want to take the time, but there is a lot of this stuff that is part of a question and part of an answer on the page—

(750) The Court: That shouldn't be read in if it is not intelligible. Just read in the questions and answers that are in themselves intelligible.

Mr. Nickerson: Could you mark it on yours? I won't have any objection to it, I am sure, your Honor, but I want to know what is being put in.

Mr. Schoenwald: I will be glad to agree with counsel to arrange to mark these afterwards, but I don't want to have the Court sit here while I mark it.

Mr. Nickerson: I want him to close his case.

Mr. Schoenwald: Then just let me read these pages in and we will go ahead and proceed.

Page 192:

"Q. Were AVE's arrangements in Europe"—

Mr. Nickerson: That has already been read, your Honor, that question and the answer, and the next question and the next answer.

Mr. Schoenwald: All right. Page 221:

"Q. If you can, please state at what meeting that was held and state what was said by each person, or, if not the exact language of what was stated, the substance stated by each person. A. Mr. Marshall pointed out that it was a (751) scheduled airline and that we would have to build confidence in our schedule. Mr. Cox told Mr. Marshall that this operation would have to be self-sustaining, and Mr. Marshall brought up the question of the westbound loading factor making it possible for us to fly a schedule at the outset, and that was the gist of most conversations concerning a schedule."

Pages 197 and 198:

"Q. That Mr. Marshall told him that? A. Yes, told Mr. Cox that it would have to be placed under Venezuelan registry; it would be impossible to operate them under U. S. registry. Mr. Marshall was agreeable.

"They jointly agreed on USOA handling all phases of the operation. I don't recall what was said about Colonel Marcano's functions. I do recall that American crews would be acceptable to them. That was a very strong point that Mr. Cox wanted to make.

"Mr. Marshall told Mr. Cox that this proposal must contain the $1,500 per trip figure, roundtrip figure, to be paid to Colonel Marcano. Mr. Marshall also proposed this figure which he had arrived at—"

Then the rest of the answer appears to be broken off.

(752) Page 239:

"Q. Would you please tell us chronologically, starting from when you arrived in Rome, the situation as to the traffic rights for AVE in Rome. A. I arrived in Rome via United States Overseas airplane on approximately August 17, 1951, and after my arrival in Rome on the same morning, I went to the AVE office and, after talking to Mr. Cover and to Mr. Botto and to a chap named Mike Menigini from the Ciampino Airport, I discovered that AVE did not have any landing rights or uplift rights at Rome."

Mr. Nickerson: Your Honor, that certainly is a problem because I am sure at that time Cover and Botto were not employed by AVE in any shape or form, and this fellow from the airport certainly was not.

The Court: Yes. Sustained.

Mr. Schoenwald: I am going to concede with respect to Mr. Mike Menigini. I think that perhaps the Colonel can tell us that as a matter of fact Mr. Cover was in his personal employ at this time and reporting to him and engaged in regular conversations with him.

The Court: Will you ask Colonel Marcano.

Mr. Nickerson: I will.

(753) Is that true?

He says no.

The Court: I have to sustain the objection.

Mr. Schoenwald: I would like to read the remainder of the question which purports to quote from Tomassini, whose agency has been conceded.

Mr. Nickerson: Wait a minute. He has read the question already.

Mr. Schoenwald: On Page 240. No, I mean the remainder of the answer, page 240, second paragraph.

Mr. Nickerson: Just one second now.

All right. The second full paragraph of the answer.

Mr. Schoenwald: I think it continues to refer to Tomassini thereafter.

Mr. Nickerson: Well, read it. Go ahead.

Mr. Schoenwald: (Reading.)

"I had further discussions with Cover concerning these rights and got him to talk with the legal representative for Ave, Serge Tomassini, and ask him to go to the Italian Air Ministry and find out what was wrong with the AVE landing rights in Rome.

"The following day, about noon, I got the report from Tomassini that he had been in the Italian (754) Civil Air Ministry and they had informed him that there had been representations made to the Italian Ministry of Alitalia, the Italian National Airline, that was flying the same route, to prevent AVE from making the second trip weekly out of Rome and that the most that they could consider would be one trip per week.

"Then I asked Tomassini to get us the full rights that they would grant us and to do it right away. The following day I made an appointment to have lunch with Mr. Velani of Alitalia in order to discuss the why of this situation and these representations by Alitalia to the Italian Government. Mr. Velani explaned to me"—

Mr. Nickerson: No. I object to what Mr. Velani said.

The Court: Objection sustained.

Mr. Schoenwald: Page 241:

"Q. Let me see if I understand you correctly. When you left Rome on the 9th of September, AVE had landing and uplift rights for both immigrant and common carriage for only one flight per week; is that right? A. Yes."

Page 22:

(755) "Q. What was that?"

To avoid reading all the preceding pages to establish the time and place of this, this was a conference prior to signing the contract.

Will you accept that?

Mr. Nickerson; Yes.

Mr. Schoenwald (Reading):

"Q. What was that? A. Well, in connection with this traffic and all, we wanted to handle the business generating in the airline as well as the operational end of it, and we were informed, of course, that all of these offices were available and it was a matter of a cable notice to get the airline traffic going again, once we began operations.

"Q. Who told you that? A. Colonel Marcano told us that."

Mr. Nickerson: I am sorry. I will have to say that it was not prior to the contract.

Mr. Schoenwald: Yes.

Mr. Nickerson: It was when they were down in Caracas.

The Court: You concede that?

Mr. Schoenwald: I concede that, yes.

(756) "A. Colonel Marcano told us that.

"Q. When did he tell you that? A. In Caracas, Venezuela."

Page 29. Sorry, starting on page 28:

"Q. Excuse me. Did he ever say anything at any of those three meetings that you later discovered to be untrue? A. I can't say that Mr. Marshall did, as far as I know."

Mr. Nickerson: May it be understood that those were the meetings prior to the execution of the contract and the "he" that he is referring to is Mr. Marshall.

Mr. Schoenwald (Reading):

"Q. Did you later"—

Mr. Nickerson: Did you get that, your Honor?

The Court: No. I am sorry.

Mr. Nickerson: He asked "Did he," meaning Mr. Marshall, "ever say anything at any of those three meetings that you later discovered to be untrue?"

And the answer:

"A. I can't say that Mr. Marshall did, as far as I know."

Mr. Schoenwald: I think that this is a point (757) that might merit some comment at this time: that Mr. Burger, who isn't presently in the employ of the company and who left the employ of the company immediately after this transaction was terminated, was subsequently reemployed as a pilot at the time this examination was taken.

The Court: Yes. I think that was already brought out.

Mr. Schoenwald: Oh, you are aware of that, your Honor.

(Reading):

"A. I can't say that Mr. Marshall did, as far as I know.

"Q. Did you later discover that anything contained in Plaintiffs' Exhibit 1 was untrue? A. Yes."

Plaintiffs' Exhibit 1 is the prospectus, I think we all understand.

Mr. Nickerson: Yes.

Mr. Schoenwald (Reading).

"Q. Can you point out what it was? A. Yes, sir. As presented here, these were the routes.

"Q. You are referring now to a map on the third (758) page of Plaintiffs' Exhibit 1; is that right? A. Yes. All right, the third page of Plaintiffs' Exhibit 1.

"Q. I am just making that for the record. A. Can I just talk and if you wish to change it, you can.

"Q. Yes.

"Mr. Halpert: You just talk and he cannot change anything.

"A. I mean I can point these out to you."

Mr. Nickerson: One moment. All right.

Mr. Schoenwald (Reading):

"Q. I want to know what there is in Plaintiffs' Exhibit 1 that you later discovered to be untrue. A. I am looking for a specific case.

"Q. Yes, that's what I want, each specific case. A. Under the franchise AVE has traffic rights to Portugal—

"Q. You are referring to the last full paragraph on page 4? A. Yes."

Mr. Nickerson: Excuse me. Your Honor, now we are getting into matters that Burger learned by hearsay and assumptions that he made which are inconsistent (759) with the documents which we have seen, I believe, and I think I am going to object to matters of that character, your Honor.

The Court: Well, do you concede that that is so, Mr. Schoenwald, or shall I rule as the questions and answers are put? There is no point of getting out of Burger's mouth his understanding and impressions of matters with respect to which we have documentary proof in the case.

Mr. Schoenwald: Yes. Now I think that this is an appropriate time to perhaps mention the documentary proof in the case as it relates to the question here because—

Mr. Nickerson: Your Honor, I think you saw them, but I don't think that they were actually put into evidence because I wanted Mr. Schoenwald to look at them.

May I hand up to your Honor Defendant's Exhibit BD and BE, which relate to the traffic rights.

Mr. Schoenwald: Could we go into these one at a time, your Honor? They are rather difficult for me to deal with, and I wonder if we could discuss each one. If we get them all in a bunch it will be difficult.

(760) Mr. Nickerson: BF. All of which relates to the traffic rights.

The Court: They have been marked for identification but as I understand it have not yet been marked in evidence.

Mr. Nickerson: No, because—I will offer them now, if I may, your Honor.

The Court: Are they referred to in this testimony?

Mr. Nickerson: No.

Mr. Schoenwald: It has some subject matter as part of this testimony.

The Court: I think it would be better, unless you object to these documents, that they be admitted as part of the record.

Mr. Schoenwald: I am objecting to the documents, your Honor, and I would like to state the grounds of each objection, and it is going to be a little difficult for me to do so unless we can have the documents one at a time to compare with my copies and my notes.

The Court: All right.

Mr. Schoenwald: Are there two documents there?

The Court: Three.

Mr. Schoenwald: With respect to Defendant's (761) Exhibit BE, I would like to advise the Court that the translation appearing in that document, in so far as it purports to describe the rights in Italy, is incorrect in our view, and we propose to submit another translation which we believe to be correct, and since it is Italian, and I suspect your Honor may have some familiarity with it, it may not be necessary to call in a translator.

In describing the claimed rights of the defendant in Italy, there is an indication of a communication from Venezuela to the Italian Government requesting the right, and then there is an indication of a communication suggesting the granting of some rights. However, that part of the communication which suggests that some rights have been granted, states that the fifth liberty right, which I understood to be the transportation of passengers—

Mr. Nickerson: Your Honor, on fifth liberty, may I hand up just a short memo which quotes the

Chicago Convention, which was signed by Venezuela and most of the countries of the world. I give one to Mr. Schoenwald.

Mr. Schoenwald: The only mention of rights granted relates to rights between Rome and Lisbon. (762) There is no reference in this document other than those between Rome and Lisbon, and, as a matter of fact, with respect to the direct request by the Venezuelan government for rights, there isn't any answer at all, except a reference to another subject matter, namely, the rights between Rome and Lisbon. And the translation which is submitted to your Honor, instead of appearing to say that there are some rights between Rome and Lisbon, it merely indicates that there are rights in Italy. Further, I suggest—

Mr. Nickerson: Your Honor, he is right on that with respect to Rome and Lisbon. I will have to talk to my client.

Mr. Schoenwald: I suggest to your Honor that this is of importance because you will note that much of the testimony and much of the depositions read into the record deal with this very critical question as to whether or not there were rights in Italy, and the occurrence of this argument at this point is a matter of some concern.

I also suggest to your Honor that these are documents which come from the Venezuelan government and that evidence of the existence of rights in Spain or Italy and the other countries they purport to (763) describe, must come from Spain, Italy and the other governments.

I call to your attention that with respect to each of the governments there is a suggestion here of the indication of a request for the rights and the grant-

ing of them, but when we get to Italy there is again a suggestion of the request for rights, but instead of an indication that rights were granted, on the contrary, all that we have is a statement that certain fifth liberty rights are pending between Portugal and Rome, and this is the area also where the words are left out in the translation.

Can you tell us which exhibit number this is that you have offered in evidence?

The Court: Your position with respect to these rights as I understand it is that you were led to believe that there were no impediments in the way of conducting arrangements for flights to and from Rome, whereas in point of fact there was an impediment because of the outstanding claims of Alitalia; is that right?

Mr. Schoenwald: Yes.

The Court: You also claim that in Lisbon you were led to believe that there were rights to (764) pick up and discharge passengers, whereas in point of fact there were no such rights at the time this plane arrived.

Mr. Schoenwald: Yes. If your Honor please, that relates really to two theories of action: one to our claim of false representation, and also relates to the possibility of performing this contract, that the subject matter of it disappeared, and consideration for the contract was non-existent.

The Court: You are basing the right to rescission on that as well as—

Mr. Schoenwald: Yes.

The Court: —a claim for recovery on the basis of alleged fraud. Then aren't you also sounding another claim in breach of contract?

Mr. Schoenwald: Yes, your Honor, and that the absence of the right or the change in their character

or their condition as being other than that which we were led to anticipate or provided for by implication or as applied to the contract is what we have in mind—

The Court: Of course it is all mixed up with what actually caused you to terminate your o eration. If you terminated your operations for (765) reasons which stemmed from other sources or from a combination of sources, including the lack of right, and including sources which were not attributable to the defendants, you see, where—it was one of the matters I was going to take up with you when the evidence is summarized.

Mr. Schoenwald: I don't think we have had any evidence on whether or not we terminated the operation.

The Court: We will get to that.

Mr. Schoenwald: The evidence is that we sent the plane to Frankfort at the particular time—

The Court: I don't want to lead you to believe I have come to any conclusions, but any factual situation is extremely complicated with respect to exactly what the situation was as of the time both parties entered into the contract and as of the time the parties purported to implement the contract by performance, as to just what prevented it from being fully performed.

Where are we now with respect to these rights?

Mr. Nickerson: I have made an offer of these, your Honor. I checked the language and he is right on BE, that is between Rome and Lisbon. Of course (766) the fifth liberty, as your Honor sees—and I won't take but a second—

Mr. Schoenwald: May I look at the other document while you are addressing the Court?

Mr. Nickerson: Yes.

The fifth liberty is one that the governments are the least anxious to grant because it is not a reciprocal right between countries, the contracting countries, but rather a right to take passengers out of the country with whom you are contracting into another country not a party to the contract which, of course, is the most jealously guarded of them because that is where they want to preserve their interest. But I think that the Italian rights sufficiently appear from Exhibit BD and from the fact that they took off, and from Mr. Burger's testimony, in fact, which has been read, that they had those rights at the time they took off.

The Court: Do you object to these papers going into the record?

Mr. Schoenwald: Yes, I do.

The Court: All of them?

Mr. Schoenwald: I do.

The Court: Come to the legal question.

(767) First you point out errors of translation, don't you?

Mr. Schoenwald: Yes.

The Court: Those, it seems to me, are mechanical matters which can be cured.

Mr. Schoenwald: Yes, sir.

I object to this document on the ground that it purports to describe rights granted by governments in Europe, Spain, Italy, et cetera, and it is a document coming from the Venezuelan Government.

Ordinarily, this wouldn't have occasioned raising an objection, excepting that one of the things that has become clear in this case is the standing of one of the officers of the defendant, and the production of documents from his government by him,

and from the office with which he was connected, as evidence of conditions relating to the affairs with foreign governments, is a matter of some concern to me.

The Court: It may be, and it will of course be to me on the question of the weight to be given to it, but how else can a man establish what his rights were? Foreign governments are not in business to conduct negotiations or communications, customarily attributable to a sovereign, with a foreign citizen. Those are (768) matters which are carried on as a matter of comity between sovereigns and between their diplomatic representatives. You can't expect a Venezuelan citizen to come forward with a statement properly authenticated by the Italian Foreign Ministry as to what the rights were given to another government. Those are matters which are dealt with between governments, and necessarily the citizens of each government have to accept and take from their own government what their own government represents are the rights conferred upon it.

I don't see, as a practical matter, how these defendants could possibly demonstrate what purport to be their rights in any other way except to get it from the appropriate Venezuelan ministry. You can argue later, if you want, that this shouldn't be believed or that this altered it, whatever you wish. That is your privilege as attorney for one of the parties, but I don't see how you can exclude it from the record.

Mr. Nickerson: Your Honor, may I say something here? Might I say in behalf of my client that I deeply resent the implication that has been made that Colonel Marcano would go down to the (769) Venezuelan government and get them to put

out false documents. They have accused this man of everything, from stealing to—there isn't the slightest basis any place at all, and I resent it, and I would like that on the record for the benefit of my client.

The Court: All right, you can put it on the record.

Mr. Schoenwald: If this is properly at issue, I would like to show the Court how my efforts have been thwarted to obtain these documents by Venezuelan authorities.

The Court: Mr. Schoenwald—

Mr. Schoenwald: But I don't think this is properly in issue.

The Court: You have to state legal objections to the introduction of documents, and I have tried to explain why you haven't established any valid legal basis for excluding these documents. Now I charge both of you with the responsibility for seeing that if there are any mistakes in the translation that they be corrected.

Mr. Nickerson: I have corrected them on that copy, your Honor.

The Court: All right. I overule your objection, and they will be marked in evidence. That (770) goes for the two Venezuelan documents.

Mr. Schoenwald: I was only speaking with respect to one document now.

The Court: What objection do you have? Which one were you referring to? Make that clear.

Mr. Schoenwald: I was referring to—

Mr. Nickerson: BE, your Honor.

Mr. Schoenwald: —BE.

Mr. Nickerson: May I have your Honor look at it?

The Court: I have. Now the other Venezuelan document is what?

Mr. Schoenwald: The other Venezuelan document—

The Court: What number?

Mr. Nickerson: I have two of them, your Honor, that I have offered, BN and BD.

Mr. Schoenwald: The other Venezuelan document, BN, is a certificate which indicates the receipt of a letter sent by Colonel Marcano—pardon me—it indicates the receipt of a request by Colonel Marcano for certain rights. It does not purport to describe or to assert that the rights were given or that they were issued. It merely indicates that a request was received by the government.

(771) The Court: That is not an objection to its receipt in evidence.

Mr. Nickerson: And it does not say that anyway, your Honor.

The Court: Whatever it says, it purports to be an authentication of a communication or a state of affairs in the files of the Venezuelan Government.

Mr. Nickerson: It is a lot more than that.

The Court: That will be seen from the face of the document.

(Defendant's Exhibit BN for identification received in evidence.)

(Defendant's Exhibit BE for identification received in evidence.)

Mr. Schoenwald: My comments with respect to this are not as to its admissibility in evidence, in view of your Honor's rulings, but as to its significance and weight, and I will defer those.

(Defendant's Exhibit BD for identification received in evidence.)

Mr. Schoenwald: Is this being offered in evidence at this time? BF is not offered. I would like to suggest to your Honor that not yet offered, although produced by the defendant, has been an (772) instrument, I think, produced for the purpose of showing that the franchise, expiring on August 8, 1951, was renewed, and while it has not yet been offered in evidence—

Mr. Nickerson: It has been already marked in evidence, your Honor.

Mr. Schoenwald: Well, if it has been marked in evidence I haven't been heard on it.

The Court: Let me see it, please.

Mr. Nickerson: It shows that they granted the renewal.

The Court: BN was just put in now.

Mr. Schoenwald: Then I have been under some misimpression about the document that was handed in. I would like to be heard briefly as to BN. Is that the document which is dated Office of the President, August 15, 1951?

Mr. Nickerson, I don't want to cause you any confusion, but I don't think that you are correct when you say that this is a document which indicates the renewal of the franchise.

Is that the purpose for which he offered it?

The Court: He didn't state that. He never stated that. You see, one of the problems, Mr. (773) Schoenwald, I have a feeling that you sort of prepare your case as you go along and that you are lost in the welter of the documents in this case. It is a terrible imposition on me to have to wait here while you straighten yourself out.

Mr. Schoenwald: I think that we have called upon the defendant to produce a document which shows the franchise has been renewed, and do I understand that that document—

Mr. Nickerson: I have already shown your Honor BN, and it is in evidence.

The Court: No. Is there a document which you have introduced into evidence which purports to show the renewal of the franchise?

Mr. Nickerson: Yes, your Honor, and this is it, BN.

The Court: All right.

Mr. Schoenwald: BN? All right. I want to object to the admissibility in evidence of BN on the ground that the Colonel has stated during his examination and in the course of the deposition that was read into the record that the best source of evidence of the franchise and its renewal lies in the Gaceta Official, and the expert produced by the (774) plaintiff in this action to the effect—the testimony of the expert produced by the plaintiff in this action was to the effect that the renewal of the franchise would not be valid or be in existence unless it appeared that it was reproduced or mentioned in the official gazette, and that this document cannot be admitted into evidence or should not be admitted into evidence until there has been some evidence that it has been reproduced or printed in the official gazette.

Mr. Nickerson: Does your Honor want me to comment on that?

The Court: I am just making some notes. Just a moment.

Yes, will you comment on it, please.

Mr. Nickerson: Yes, your Honor.

There can't be any better evidence than what actually comes out of the files of the Venezuelan

Government, and this is it. The fact that it is published in the gazette may or may not have a bearing on whether the renewal was authorized or not, and the Venezuelan expert that I will have this afternoon will testify not only that it does not, but the whole presupposition of their expert was right, namely, that it had to be published to the Congress because at that (775) time there was no congress in Venezuela.

Mr. Schoenwald: If your Honor please—

The Court: I overrule your objection, on Mr. Nickerson's representation.

Mr. Schoenwald: All right.

The Court: My experience is that very often in these governments the official gazette is not always a rigid and fast measure of the validity of an official act and there are a great many official acts which have been properly proven to be valid, binding and official, that either get into the official gazette, tardily, and in some instances never get in at all, and there are many instances where that has occurred.

Mr. Nickerson: You will recall that the basis of it was that it had to be published to the Congress. Even assuming that that is right, he said that he probably assumed the only place it could be published in the Congress was in the official gazette, and there was no congress at that time.

The Court: Yes, because the official gazette is the official publication of the acts of Congress, so that presupposes that there is a Congress.

Mr. Nickerson: It has other things besides (776) that, your Honor.

The Court: Well, I don't want to get into a discussion about it, but Mr. Nickerson has made a representation with respect to adducing proof

through an expert, and I think on the basis of his representation the document should not be kept out of the record on your objection.

BN is marked in evidence.

Are there any further pages from the deposition that you want to read?

Mr. Schoenwald: There are several. Perhaps I ought to finish that up after lunch and then we can go on. I will rest immediately—

The Court: Go ahead and finish all you can, please.

Mr. Schoenwald: Page 46:

"Q. Lagustas?"

Mr. Nickerson: Wait one second.

Mr. Schoenwald: I am sorry. I am going to withdraw that item. Page 117:

"Q. What was the next meeting with Webb? A. In the B compartment of the airplane.

"Q. Was Colonel Marcano present? A. Not all the time, no.

(777) "Q. Was anyone else present any part of the time? A. No.

"Q. What was said at that meeting, and indicate, if you will, when Marcano was present. A. Webb told me"—

Mr. Nickerson: Your Honor, this does not show whether Colonel Marcano was present at that time. I have no objection to the parts where Colonel Marcano is shown to be present, but—

The Court: Colonel Marcano or any employee of the defendant.

Mr. Nickerson: Yes. Well, he was the only one on the ship at that time.

The Court: I sustain the objection and limit you to those conversations.

Mr. Schoenwald: Reading from the second paragraph of the answer:

"Later, Colonel Marcano came up and Lloyd Webb told him that Ralph Cox had sent him down to get the airplane and the spare parts out of Caracas, and he wanted to know—he assured Colonel Marcano that he decided against doing that, that he didn't wish to interrupt the operation, and he said that he and Clemett (778) were most interested in carrying on the operation. And Colonel Marcano said—he began to talk about his contract with Mr. Cox, and Lloyd Webb said, 'Of course, we are just going to do this for insurance, in case Mr. Cox doesn't want to go ahead.'

"He said, 'I would like to get into this deal. I think I would have a good opportunity.' And they seemed to agree on the fact that that might be a good program. Colonel Marcano said that he wanted to talk to Mr. Marshall before he did anything like that. And then Colonel Marcano left and went to the cabin again and Webb and I continued talking up in the B compartment."

Mr. Nickerson: May I move to strike out that portion where he says what they seemed to do?

The Court: Yes, motion granted.

Mr. Schoenwald: Page 165, 166:

"Q. From whom did you learn that and what did you learn? A. I learned from Comandante Botto that Dr. Tomassini and Dr. Fiorentino"—

Mr. Nickerson: No. I object to it on the same ground as I previously did. Botto was not employed by them.

(779) The Court: Yes. Sustained.

Mr. Schoenwald: Are you going to object to testimony of conversations with Mr. Cover?

Mr. Nickerson: Of course I am. I already have, and the Judge excluded them.

Mr. Schoenwald: Pages 181 and 183—page 182:

"Q. Let me ask the question."

Mr. Nickerson: Now this has already been read in, your Honor.

Mr. Schoenwald: I am sorry. That is correct. Page 261—page 260:

"Q. Was this something you told Colonel Marcano? I want to know what you told Colonel Marcano and what he told you. A. Predicated on the arrangement with Coe & Clerici, I told Colonel Marcano and Colonel Marcano saw the arrangement that Mr. van Bohemen had developed with Coe & Clerici which would eliminate the employment of any direct employee in Rome; and where Mr. Tomassini had been the direct representative of AVE in Rome, his services would no longer be necessary under our arrangements with Coe & Clerici. I told Colonel Marcano that in substance.

"Colonel Marcano told me that he wished (780) to retain Mr. Tomassini and wished for Mr. Tomassini to continue to be the legal representative for AVE and Coe & Clerici with that view; and they refused at first to accept Mr. Tomassini as a legal representative.

"Q. Who approached Coe & Clerici? A. Mr. van Bohemen. Mr. van Bohemen informed me of this fact, and I told Colonel Marcano, and Colonel Marcano again told me it would be necessary to retain Mr. Tomassini as the legal representative.

"A compromise arrangement was worked out, at my suggestion to Mr. van Bohemen, between Coe & Clerici and AVE wherein Mr. Tomassini would be the legal representative but Coe & Clerici insisted that he must maintain his office elsewhere and not on their premises."

Mr. Nickerson: I object to what Coe & Clerici said.

The Court: Sustained.

Mr. Schoenwald: (Reading.)

"This arrangement was reported to Colonel Marcano and he thought—Colonel Marcano did—that it would be satisfactory"

At this point the plaintiff rests.

(781) The Court: You reserve your right to move, Mr. Nickerson?

Mr. Nickerson: Would you want me to—

The Court: I think it might seem appropriate. It might give me a freer opportunity to engage in a legal debate on the summary of the evidence which I will give you an opportunity to have.

Mr. Nickerson: Would your Honor want me to read in some questions from Burger's deposition before lunch? It may be fairly rapid.

The Court: Yes.

• • •

By Mr. Nickerson:

(810) This is page 144 (of Burger's Deposition):

"Q. I show you Defendants' Exhibit 135 for identification"—your Honor, that is now Defendant's Exhibit BA for identification.

Mr. Schoenwald: Can you tell me what BA is?

Mr. Nickerson: Yes. It is a letter from Mr Burger to Colonel Marcano.

(811) "Q. (Continuing)—and ask whether that is your writing? A. Yes, that is my writing.

"Q. Do you recall about when that was written and perhaps this envelope will refresh your recollection? A. That was written in early November from Miami, Florida, 1951."

I offer it in evidence.

Mr. Schoenwald: I am going to object to this being offered in evidence.

The Court: This is a letter written by your employee.

Mr. Nickerson: No, your Honor. USOA; Burger was employed by USOA.

The Court: Was he employed—

Mr. Nickerson: He was not employed at that time, at the time that he wrote the letter. But he was employed at the time—

The Court: How can he write a letter at a time when he is not employed which is binding upon the employer?

Mr. Nickerson: At the time that his deposition was taken, your Honor, he was an employee of USOA, and his deposition has been read in evidence—

(812) The Court: I understand.

Mr. Nickerson:—as a witness, so this has certainly a bearing on the credibility.

The Court: But this letter was not written when he was an employee.

Mr. Nickerson: No, it was not. But it certainly has a bearing on his credibility as to who he thought was responsible for it.

The Court: You mean it is offered for the purpose of impeaching him, is that right?

Mr. Nickerson: Yes, your Honor.

Mr. Schoenwald: Or impeaching him with respect to the testimony that you are introducing?

Mr. Nickerson: No. With respect to the testimony that Mr. Schoenwald has introduced. He read his direct.

Mr. Schoenwald: I suggest that the impeachment of a witness by a letter which he has had, there is no adequate opportunity, we have had no adequate opportunity to examine him with respect to it now, at this time, and that it is prejudicial to us.

Mr. Nickerson: It was introduced on the deposition.

(813) The Court: Yes, it appears to have been introduced on the deposition. Why do you say you had no opportunity to examine him?

Mr. Schoenwald: We had an opportunity to examine him at that time, but we didn't know that this letter would be introduced for this purpose. We can't examine him now.

The Court: Did you not offer this at the time of the deposition?

Mr. Nickerson: Well, your Honor, I had it marked for identification.

The Court: Was it shown to the witness?

Mr. Nickerson: Why, certainly.

The Court: Will you please read that section of the deposition?

Mr. Nickerson: Yes, your Honor. Page 144.

"Q. I show you Defendants' Exhibit 135 for identification and ask whether that is your writing? A. Yes, that is my writing.

"Q. Do you recall about when that was written and perhaps this envelope will refresh your recollection? A. That was written in early November from Miami, Florida, 1951."

(814) Mr. Schoenwald: I am going to withdraw my objection to the introduction of the letter.

The Court: All right. It will be marked. I just want to finish reading it.

(Defendant's Exhibit BA for identification received in evidence.)

Mr. Nickerson: Page 238:

"Q. Prior to Mr. Cover being assigned to the job of going to, I think you said Lisbon? A. Yes.

"Q. (Continuing)—had you had discussions with Colonel Marcano about the necessity of having the landing rights cleared up in Lisbon? A. Yes.

"Q. Did you also have discussions with him as to the necessity of reactivating the possibilities of getting immigrant traffic out of Lisbon? A. Yes."

* * *

(832) Mr. Nickerson: May I call Dr. Tenorio, your Honor? May we have Colonel Marcano and Mr. (833) Talero sworn as interpreters?

The Court: Yes. As I understand it, Mr. Marcano has been good enough to agree to act as interpreter but Mr. Schoenwald would like Mr. Talero to sort of stand on the side, and in the event we see any flagrant errors then he reserves the right to ask to intervene to determine whether there had been any errors. We hope we will be able to get along without any trouble.

(Mr. Jorge Marcano and Mr. Luis A. Talero were sworn to act as interpreters.)

RAMON TENORIO, called as a witness on behalf of the defendant, being first duly sworn by the clerk through Mr. Jorge Marcano, testified as follows:

Direct Examination by Mr. Nickerson:

Q. Mr. Tenorio, will you tell us whether you are a lawyer, a Venezuelan lawyer licensed to practice in the Venezuelan court? A. (Through interpreter) Yes, I am.

Q. And did you take a degree in Venezuela? A. Yes.

Q. What university was it? A. In the University of Caracas.

(834) Q. Did you practice in Venezuela? A. I have two years and a half of practice.

Q. I show you Defendant's Exhibit BJ and I will call that the franchise. And I show you—

Mr. Nickerson: May I ask Colonel Marcano whether he has actually translated the contract dated July 25, 1951?

The Court: Well, put the question and he will translate it again.

Mr. Nickerson: Now I am going to ask Colonel Marcano because he made the translation, not Dr. Tenorio. Or perhaps it may be stipulated that Colonel Marcano made it with the right for them to check it afterwards.

The Court: Yes. I assume that the translation is correct.

Mr. Nickerson: Perhaps we had better have it marked for identification.

(Defendant's Exhibit CB marked for identification.)

Mr. Schoenwald: Will you give us a copy?

The Court: Unless Mr. Schoenwald points out amendments or corrections I will assume that it is (835) correct.

Mr. Nickerson: Yes.

Mr. Schoenwald: Will you furnish us with a copy?

Mr. Nickerson: Yes.

Q. Have you examined both of those documents? A. Yes, I have examined them.

Q. And did you form an opinion as to whether or not document Defendant's Exhibit CB for identification violated Defendant's Exhibit BJ for identification? A. I consider that Defendant's Exhibit CB does not violate Defendant's Exhibit BJ.

Q. Will you look at paragraph 13 of the franchise. Now will you tell us whether in your opinion Defendant's Exhibit CB made a transfer of rights and obligations within the meaning of paragraph 13th of the franchise? A. In my opinion Defendant's Exhibit CB, which was celebrated between CAVE and USOA does not constitute a transferance of the rights and obligations that CAVE had acquired by virtue of a contract that was celebrated between CAVE and the Federal Executive of Venezuela.

(836) Q. Would you give us the reasons for your opinion? A. I fundament my opinion on the—

The Court: Base.

A. I base my opinion on the following—

The Court: May I suggest that in lieu of the term "celebrated" you use the term "executed by and between."

The Witness: Executed between.

The Court: "I base my opinion"—

A. (Continuing) —on the following: It is clear to myself from clauses of the contract executed between CAVE and USOA that CAVE maintained and exercised control over USOA. This is based upon the letter "B" of numeral 3 in which it is established that the matters of policy of the company and the matters of major concern relative to the conduct of the operation would be determined and carried out in accordance with the decisions duly adopted by CAVE's board of directors.

Furthermore, in letter "C" No. 2, CAVE reserves for itself the right to make final decision in everything relating to the personnel. In other words, CAVE reserved for itself the right to veto (837) the personnel.

Q. Now you have seen Defendant's Exhibits BL and BN, have you not? A. Yes, I have seen them.

Q. Now, Dr. Tenorio, in your opinion does Defendant's Exhibit BN—

Mr. Schoenwald: Would you characterize that for me? I am not familiar with the letter.

Mr. Nickerson: Yes. It is the letter of the Ministry of Communications to Foreign Relations stating that they have extended the franchise and asking Foreign Relations to get the rights.

Mr. Schoenwald: Is that in evidence?

Mr. Nickerson: Yes. BN in evidence.

Would you repeat my question?

(Question read.)

Q. (Continuing) —which is dated subsequent to Defendant's Exhibit BL—

Mr. Nickerson: May I inform your Honor that BL is the document which Colonel Marcano wrote to the Ministry of Communications describing the transaction that he entered into with USOA.

Mr. Schoenwald: Is that in evidence?

Mr. Nickerson: Yes.

(838) (Question read.)

Q. (Continuing) —indicate anything as to whether the Ministry of Communications construed the provisions of Defendant's Exhibit BL to be in accordance with the franchise?

Mr. Schoenwald: Objection, your Honor. Now this is calling for a conclusion; it is not based on adequate evidence before the Ministry. I think what he is attempting to ask is whether or not the terms of the contract between USOA and CAVE were the subject of construction on the part of the Ministry when there is no indication that the Ministry even had a copy of the contract.

Mr. Nickerson: I did not ask him that, your Honor. I don't want to argue.

The Court: I think he is entitled to explain whether as a juridical matter such a significance can be attached to an exhibit already in evidence. I think the question is a fair one. I will allow it.

(Question read.)

A. This document marked BL and dated July 30 of 1951, CAVE informed the Ministry of Communications of its agreement with USOA.

(839) I consider that by this document marked BN, addressed from the Ministry of Communications, to the Ministry of Foreign Relations of Venezuela with the purpose of obtaining rights and privileges for CAVE, the Ministry considered that the agreement between CAVE and USOA was legal, perfectly legal.

Q. Dr. Tenorio, was there any Congress in Venezuela in 1951? A. No. In 1951 there was no Congress in Venezuela.

Mr. Nickerson: Your witness.

Cross Examination by Mr. Schoenwald:

Q. Was there a Congress in Venezuela in August 1950? A. (Through interpreter Talero.) No.

Q. Was the Official Gazette used in 1950 to report the existence of franchises? A. I considered it was not.

Q. In 1950 was it the practice to report franchises and renewals of franchises in the Gazette? A. No.

Q. I show you Exhibit 392 for identification and ask you if this is not a copy of the Official Gazette of Venezuela of 1950 and if it does not (840) report a renewal of the franchise of CAVE in 1950? A. Yes.

Mr. Schoenwald: I would like this paper now marked in evidence.

Mr. Nickerson: I have no objection.

(Marked Plaintiff's Exhibit 392 in evidence.)

Q. Now, have you examined Defendant's Exhibit BN, the contract between USOA and CAVE, and Defendant's Exhibit BL and compared them?

Mr. Nickerson: It is CB.

Interpreter Talero: Have you finished the question?

(Question read.)

Mr. Nickerson: The record should show that he examined the translation.

The Court: And compared it with BL. I think you said with CB.

Interpreter Talero: CB on this one. Which is the right number?

Mr. Schoenwald: Perhaps I can characterize the document and be certain we have that.

Q. Is the contract between USOA and CAVE and the letter from CAVE—

(841) Mr. Schoenwald: I think you gave me the wrong paper.

Mr. Nickerson: No, you have it in your hand.

Q. (Continuing) —and the letter from CAVE to the Ministry of Communications reporting on the existence of a contract.

The Court: What is that number?

Mr. Schoenwald: BL.

Interpreter Talero: Now I have the wrong paper here. May I have that, please?

(Question read.)

Interpreter Talero: Yes. He says, "I have examined" and he says, "I have compared."

Q. Are there not many differences? A. I consider there are not because the memorandum presented by CAVE to the Ministry of Communications contains a summary form of stipulations of the contract between CAVE and USOA.

Q. Does the memorandum, Exhibit BL, report that Overseas, or USOA—

Mr. Schoenwald: If your Honor please, I am going to make my question a long one and then perhaps when it is read back it can be read back (842) in pieces.

The Court: Isn't it a matter of clear inference, because both papers are in evidence, as to what the differences between them are, if any? If there are any textual differences I don't think you ought to bring it out by testimony. The argument is available to you. It is a matter of what the experts testify to.

Q. Do you have in Venezuela a concept known as equity?

The Court: I can answer that. The Venezuelan law stems directly from the Roman law and Justinian Code and the concept of equity is basic to their jurisprudence.

Mr. Schoenwald: I have a language difficulty with this man. I believe the line of questioning that I am about to undertake, and perhaps with the aid of these experts, you can assist in the phrasing of the question. It seems to me that the witness has testified to date that that which makes this something other than a transfer of the franchise is the reservation of control and the veto power, and I am suggesting that this is a mere dummy transaction. And I (843) want to inquire of this witness if the Venezuelan law does not recognize this concept that where a transaction is of an illusory character that the Court there, and the law there, will look within the corners of the agree-

ment and if it finds, in fact, that the substantial considerations, the substantial factors are other than the names that are denominated, or the superficial impressions that it indicated, that under Venezuelan law the court will look through this transaction.

Mr. Nickerson: Your Honor, I am going to object to all that line on the ground that the contract speaks for itself as to that. It doesn't show that it is illusory. On the contrary—

The Court: I think you are arguing with the witness. What you are asking him to do is to eat his words. He says that the retention of power is a perfectly valid provision and because the retention of power is valid it gives it or invests it with a different legal significance.

Now what you are doing is to say to him, "I direct your attention to that retention of power and I ask you to admit whether or not that is not a sham, and in view of the fact that (844) it is a sham, assuming, I will say, it is sham, doesn't the court of Venezuela have the right to pierce that sham and to treat the transaction for what it really is."

Mr. Schoenwald: The last question, doesn't the court of Venezuela have the right to pierce that sham would be a question of Venezuelan law as to which I—

The Court: Yes, but he has first to admit that it is a sham. It seems to me that you could ask that in one question.

Mr. Schoenwald: I should like to ask, if there was a sham, does the court of Venezuela—

The Court: No, because you haven't laid a proper foundation for it. Until he is prepared to

say that it is a sham everything else is just based on suspicion.

Mr. Schoenwald: That would be a conclusion as to the time, wouldn't it, if he said it was a sham?

The Court: No. He has characterized this retention of control as being extremely significant and he has explained why it is significant, and until you can get him to withdraw (845) what he has said, everything else it seems to me stems from speculation.

Q. What are the principal rights and duties which are granted by the franchise?

Mr. Schoenwald: Does your Honor see the point? I think he is going—

The Court: We are never going to get through.

Mr. Nickerson: Isn't this all argument and a conclusion?

The Court: Why don't you ask him a direct question, Mr. Schoenwald? Come to grips with the specific link of relevance that you are trying to establish.

Mr. Schoenwald: I have two questions which I intend to present to this witness, and if I tell you, your Honor, the second I think that it will be apparent that this is material. My question is:

What are the rights and duties created by the franchise? And the second, are these not essentially rights and duties transferred to USOA by the contract? I think the answer must be yes and I think that would be a material and (846) important answer for the Court to hear.

The Court: All right, go ahead, put the question.

Q. What are the duties and rights and privileges which the franchise creates and gives to CAVE? A. Exploit the air transportation of passengers, cargo and mail.

Q. Will you look at the franchise to see in the particular clauses whether or not there are other rights and duties given to or imposed upon CAVE under the franchise?

(Question read.)

The Interpreter: He doesn't have it.

Mr. Schoenwald: Off the record.

The Court: I suggest, off the record—

(Discussion off the record.)

Q. Under clause 13 of the franchise are any of the rights of the franchise transferable? A. Yes.

Q. Which one? A. Clause 13 reads that the contractual party could transfer the rights and duties that (847) appear from this contract previous approval of the Ministry of Communications.

My opinion is that it refers to all the rights and duties and obligations that appear from the contract.

Q. Well, does not the rest of clause 13 state that these transfers can be made only to a Venezuelan corporation? A. Yes, it does.

Q. What rights under the franchise can be transferred to a non-Venezuelan corporation, if any? A. None of the rights can be transferred to any non-Venezuelan company.

Q. Can any of the duties be transferred to a non-Venezuelan company? A. No. The rights and obligations cannot be transferred.

Q. Is one of the rights and obligations of the franchise the conducting of flight operations, traffic functions, ticketing, reservations, providing of personnel, et cetera?

Mr. Schoenwald: I would like to withdraw that. That is a little bit confusing.

Q. Are these among the rights and duties of (848) the franchise, and then the following list:

Conducting flight operations, maintenance, traffic functions, ticketing, reservations, providing personnel?

The Court: Why don't you stand next to the interpreter and point to each one so that he can translate them.

Mr. Schoenwald: (To interpreter.) That is enough.

A. In my opinion the rights and obligations of the franchise consist in the exploitation of the transportation of passengers, cargo and mail that the Federal Executive of Venezuela granted to CAVE.

Mr. Schoenwald: I wonder if you could tell me that answer again; the words were a little confusing.

(Answer read.)

A. But as I said, at the beginning of the questioning by the defendant's lawyer, when I gave my opinion of which I considered that the contract between CAVE and USOA does not constitute a transfer of the rights and obligations under the clauses of the contract celebrated—executed between CAVE and the Ministry of Communications. I maintain (849) this opinion.

Q. Is not one of the primary aspects of the exploitation of the franchise the earning of money? A. Yes.

Q. Have you noted that USOA keeps the money under the contract between USOA and CAVE?

Mr. Nickerson: I object to that, your Honor.

The Court: I sustain the objection.

Q. Are there any rights and obligations transferred from CAVE to USOA by the contract between them?

Mr. Nickerson: Your Honor, I do not think that is a proper question unless it is related to paragraph 13.

The Court: Yes, I think so too. Will you read the question.

(Question read.)

Mr. Schoenwald: If your Honor please, before you rule on the question I would like to point out that my recollection is that the witness said that no rights and obligations could be transferred pursuant to clause 13, so that it wouldn't make any difference whether or not I asked for any of (850) the particular rights under clause 13.

The Court: He has said now, at least three times, that he didn't consider that the contract between CAVE and USOA constituted a transfer of the rights and obligations because of the clause of the contract between CAVE and the Ministry of Communications. He has adhered to that, and you have tried to dislodge him from that opinion and he refuses to be dislodged. I can't see where this is going to take us. I can think of 10,000 questions to put to him and obviously he is going to say that that is his opinion. It seems to me that where you are in the realm of expert opinion of foreign law the best you can do is to establish your expert's opinion, the other side has established its opinion, and it is a matter for the trier of the fact to decide which opinion it is going to take.

Mr. Schoenwald: I think this witness has testified to a conclusion and I think he has given me very little basis for the conclusion that he has testified to.

And I had the impression that one of the functions of the agreement was to demonstrate that the conclusions upon which he had (851) based his opinion were ill-founded. That is what I am attempting to do.

The Court: But one of the things you can't do about expert testimony is to use the cross-examination as a basis for becoming an expert yourself. Now, just as medical doctor is not expected to give you a course in medicine, a legal expert is not expected to give you a course in foreign law. His expertise is the basis for his opinion, and once that opinion has been established and the basis for his opinion has been set forth, that is as far as you can go. He has told you what documents he has inspected. He has told you what conclusion he has come to. It is a very disconcerting thing. In medical testimony frequently you find two specialists at opposite poles on the very same subject with the same patient. They will agree on all of the clinical symptoms but they come to opposite conclusions. I can understand your being disturbed, but I can't see that that gives you any greater right—

Mr. Schoenwald: What little experience I have had in medical testimony, I have seen interrogations, such as those conducted by Mr. Gair, (852) where he tests the witness' knowledge of the subject matter as to the basis of his opinion. As a matter of fact, it is a logical thing. But I can't argue with your Honor about the matter.

Q. Can you tell us with respect to clause 13 of the franchise what the word "participate" refers to?

Mr. Nickerson: Your Honor, isn't he asking him —well, I will withdraw it.

Q. With respect to clause 13 of the franchise what does the word "participate" refer to? A. The word "participate" is taken here in its proper grammatical sense, to take part.

Q. Now what does the word refer to? To take part in what? A. The final part of the paragraph—of the clause explains it clearly. The respective shares will be nominal shares—

The Interpreter: "Nominative" I think he said.

Mr. Nickerson: That is our translation.

A. (Continuing)—"nominative" and in no case could participate in the company, foreign companies or governments.

(853) Q. Does that mean that no American company can buy shares of CAVE? A. No, it does not mean that. All American companies can buy CAVE shares.

Q. Are you familiar with Article 49 of the Venezuelan Constitution? A. I don't remember what is the number of the article, but if the lawyer present will indicate to me the number I could explain the answer.

Q. I would first like to ask whether or not agreements affecting public interest are, agreements such as that between AVE and CAVE, published in the Gazette.

Mr. Nickerson: Now, your Honor, he has not referred to anything. What does he mean, public interest? If he refers to a provision I think he should have the provision before him.

The Court: Well, how is it that you are bringing in the relationship between CAVE and AVE now?

Mr. Schoenwald: I am sorry. CAVE and USOA in my case.

Q. Is the agreement between CAVE and USOA an agreement affected with a public interest?

(854) Mr. Nickerson: Your Honor, those are words of art in our law and I do not think it is a fair question. If he has a provision of the Constitution I think it is only fair to the witness that he have it before him.

The Court: Yes. Why don't you read the constitutional provision first, since that is what you obviously have in mind, and then ask him whether this contract comes within the purview of the constitutional provision.

Mr. Schoenwald: I had hoped by not showing him the clause first that I might get an answer less affected by the witness' purpose—

The Court: I know. But as a matter of fairness, and because we are trying to be clear about what we are saying, I think you should do it that way. It is a term of art. You are trying to get it within the terms of the Constitution. That is what your expert relied upon. Now get to this witness fairly and squarely on that basis.

Mr. Schoenwald: All right. I feel that on cross-examination, your Honor, I ought to have a greater latitude than just permitting him to make a conclusion, you know, which is—

(855) The Court: No. But you have to be explicit, and I think it is always important that the witness understand the questioner and that the trier of the fact understand what is going on, too. What is the use of getting testimony on the record that is going to be the subject of further speculation and confusion?

Mr. Schoenwald: Perhaps I could put the question, the Spanish phrase, affected with the public interest before the witness and let him answer that first.

The Court: Direct his attention to the constitutional provision with that phrase in it, and then ask him whether this contract comes within the purview of that constitutional provision. That is the way to put it to him. Please follow my instructions.

Q. I show you paragraph 49—

Mr. Nickerson: You mean Article 49.

Q. Article 49 of the Constitution of Venezuela and ask you whether or not the contract between CAVE and USOA is one of the agreements coming within the purview of that section of the Constitution? A. I must state first that this Constitution (856) shown to me by the lawyer is not the actual Constitution of the United States of Venezuela.

The Court: "It is not the Constitution now in force and effect."

The Interpreter: That is right.

Q. Does not the present Constitution re-incorporate this provision? A. I don't know exactly.

Q. Substantially, does it not?

Mr. Nickerson: Can we get together later on the Constitution that was then applicable?

The Court: Why don't you call his attention to that particular phrase "public interest" and regardless of whether it is or is not in the Constitution ask him whether this contract is subject to that term. And then later, if you gentlemen agree where that term is, you can settle up your diffierences.

Mr. Schoenwald: As a matter of fact, I think that my question should have included "in 1951" because whether or not it applies now is really of no consequence.

Mr. Nickerson: 1950, your Honor.

Mr. Schoenwald: 1951.

(857) Mr. Nickerson: 1951, you are right.

Mr. Schoenwald: I would like to restate the question.

The Court: All right. Restate the question.

Q. Was this Constitution in force in 1951? A. No.

The Court: All right. Now try to—

Q. Now under the terms of Article 49 of the document before you—

The Court: Regardless of whether it was in the Constitution.

Mr. Schoenwald: Yes.

Q. Regardless of whether or not it is in effect, is the contract between CAVE and USOA contract coming within the purview of that article of the Constitution?

The Court: Point out the specific terms that you have in mind, particularly the phrase "affected by public interest."

Q. As a contract affected by a public interest. A. In my opinion the contract executed between CAVE and the Ministry of Communications is a contract of public interest.

Q. And under this article could such a (858) contract be the subject of an assignment in part to USO Airlines?

(Question read.)

Mr. Nickerson: Your Honor, I object to that on the ground that it implies a conclusion. In other words, the proper question would be whether the USOA contract violates the article, I would think. It is something that is in effect.

The Court: I think the question is proper if it were amended to include the phrase "assuming that this article had the force and effect of a constitutional provision," and then he would be in a position to argue from that with respect to this expert.

Mr. Nickerson: That is what he is doing in part, your Honor, and the witness has already explained that in his opinion there has been no assignment of any kind or character, because the thing that is significant here is that they retained control over it.

The Court: Yes. I didn't appreciate your objection before.

May I hear it just once more.

(Question read.)

(859) Mr. Schoenwald: May I be heard?

The Court: I sustain the objection. It is argumentative. It becomes argumentative. You see, you must be careful between clarifying this witness' testimony and trying to put in his mouth things that he has not said.

Mr. Schoenwald: If your Honor please, I am not trying to clarify this witness' testimony. I am trying to get him to withdraw, to change his testimony.

The Court: Yes. Well, if you can continue it you might be able to succeed by exhausting him. I am trying to prevent you from doing it. All you can do is to clarify and elucidate what he is saying.

Mr. Schoenwald: If your Honor please, there are two questions I think. One is whether or not the contract between CAVE and the Government is affected with the public interest. To that question the witness has answered. The other question is the conclusion as to whether or not USOA's contract with CAVE comes within the purview of being prohibited by this contract, and I thought that I would like to bring that up in part.

(860) The Court: He said very clearly that he considered that the contract between CAVE and USOA wasn't a transfer because of the contract between CAVE and the Ministry of Communications. That has been brought out repeatedly, but you are trying to ask him a conclusion as part of the question and it is a conclusion he will not adhere to and it is argumentative.

Mr. Schoenwald: I should like to ask him now whether or not there is anything in the contract between USOA and CAVE relating to the public interest which are transferred.

Mr. Nickerson: Your Honor, haven't we been over this before?

The Court: Yes, we have.

Mr. Nickerson: I am going to object to it.

The Court: I sustain it on the ground that it is covered.

Mr. Schoenwald: All right. That is all.

Mr. Nickerson: May I just ask one question? I promise it will be one.

(861) Re-direct Examination by Mr. Nickerson:

Q. Will you tell us why, if there was no Congress in 1950, there should be a provision in paragraph 18 with

respect to the Federal Executive notifying the National Congress of the contract?

(Question read.)

A. What I interpret of the provision established in the 18th clause is that the Federal Executive would account for the present contract to the Congress that should meet later on.

Mr. Nickerson: No further questions.

Mr. Schoenwald: If your Honor please, here with me in court is Mr. Halpert, associated with the plaintiff, and I think that I would like him to ask a question of the witness which he appreciates and which I do not fully understand.

(Mr. Schoenwald conferred with Mr. Halpert off the record.)

Re-cross Examination by Mr. Schoenwald:

Q. I direct your attention to the second sentence of paragraph 13 and I ask you whether or not a company organized in the United States of America could buy or receive any shares in CAVE?

Mr. Nickerson: Your Honor, he has (862) already answered.

The Court: Let him answer it once more.

(Question read.)

A. It can perfectly buy and receive CAVE shares.

Q. What does the word foreign companies mean? A. Foreign companies in accordance with the Venezuelan law are those that not being national neither have in Venezuela the main—

Mr. Marcano: "Residence."

A. (Continuing)—the main center of its exploitation, commerce or industry.

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(863) RALPH COX, JR., resumed.

Re-direct Examination by Mr. Schoenwald:

Q. Mr. Cox, can you tell us if you recall the circumstances under which paragraph 1(i) of the contract between USOA and CAVE, Defendant's Exhibit N, was made? A. The part that is initialed you are referring to?

Q. Yes, the part that seems to be written in ink.

The Court: You mean that part having to do with the purchase of the planes?

Mr. Schoenwald: Yes.

Mr. Nickerson: Here is the original.

Q. Go ahead. A. Yes. Well, we spoke to Mr. Marshall when (864) this draft was made that we didn't want to make the airplane available on an option unless the representations and the predictions and the—that he told us about and that he presented in the brochure were so, and we wanted this tied in to that.

So he said, "Well, we can write it in," and if I recall rightly he wrote this in and we initialed it and it was finally agreed that we put in as defined in this agreement. We said that if this traffic didn't materialize as represented, then we would be obligated to supply two airplanes to him unless it were modified to this extent, so that is what happened. We agreed on it and initialed it as shown here.

Q. Can you tell us, looking at the paragraph immediately below, which I think is (j), consisting of two sentences, how it was that this paragraph came to assume the shape that it did, the form that it did? A. Mr. Marshall said that the traffic backlogs being what they were would require at least two and probably three roundtrips a week, and he was quite concerned with the establishment of enough airlifts to accomplish this traffic movement. Therefore we agreed to fly these schedules if the traffic was there and consistent with the traffic, and on his repre- (865) sentation that there would be at least two trips and possibly more trips per week, necessitating, he said, at least two airplanes, this paragraph was inserted in the contract.

Q. How many crews did you send to Europe? A. We sent two extra crews to Europe. We sent them prior to the first flight.

Q. And the crew in the airplane? A. Plus the crew in the airplane.

Q. Those crews are listed in the sheet itemizing the damages for salaries? A. I think they are, yes.

Q. I want to draw your attention to paragraphs (1F, 1A, 1D and F) and tell us how those came to be made. I think they are the sections dealing with the providing of airplanes. A. Well, we had the airplanes—under A we had the airplanes and the crews, spare parts, maintenance. We agreed to furnish that. The Venezuelan flag and their CAVE markings were a requirement which we said would be acceptable.

Q. Was there much discussion about your ability to provide the airplanes and was there any discussion about your willingness to fly under any circumstances? (866) A. Mr. Marshall was concerned with the equipment. He wanted to make certain that we could provide the equipment because he said that with that traffic you have just

got to have the airplane there and you have to have them there on time before, I think it was, the 15th of August.

He was also concerned that we had enough equipment. Therefore he wanted two airplanes, and it would take two airplanes to fly three trips a week. We had the airplanes and we convinced him that we had them and could produce them.

Under D: Maintain and establish adequate maintenance bases and their facilities. We agreed to do that, and we felt that we had the equipment and the men to do it.

When this contract was made, we weren't sure if we—just exactly where we would ultimately do the maintenance. We felt, though, that we could solve that problem.

Under F: Pay to CAVE $1500 per roundtrip flown. This was a requirement by Mr. Marshall. He was so confident that we would have at least two trips that we agreed to fly—that it was determined that we would pay a minimum of $3000 a week, which was two (867) times $1500 per trip. This of course was contingent upon the traffic being there, and he said that there was no doubt that the traffic was there, that we shouldn't worry about that.

Q. Now up until the meetings in New York on September 15th had you received any complaints from Colonel Marcano or anybody else associated with AVE about the way you were carrying out your part of this contract?

A. No, not that I can recall.

Q. As a matter of fact, when was the first time you received any kind of complaint at all or indication that the contract wouldn't continue? A. Complaint from them?

Q. Yes. A. It seems to me the first complaint was when Mr. Russell called me. I believe that is the first time he complained about our performance, except that Marshall, at that meeting we had, blamed us for prac-

tically everything. He said it was our fault for the traffic not being produced and didn't want to assume any responsibility for this bogging down of the operation.

Mr. Schoenwald: All right.

(868) Re-cross Examination by Mr. Nickerson:

Q. Mr. Cox, you are not changing your testimony of the other day that Mr. Marshall told you that everything with respect to the operation and the prospectus was contained in the Gotch & Crawford study, are you?

Mr. Schoenwald: I am going to object. I don't think that was the man's testimony exactly.

The Court: He may state whether he adheres to that or not, his prior testimony.

The Witness: Will you repeat that.

(Question read.)

A. No, I don't believe so.

Mr. Nickerson: No further questions.

Mr. Schoenwald: That is all.

Mr. Nickerson: May I recall the Colonel, your Honor?

The Court: Yes.

JORGE MARCANO resumed.

Direct Examination by Mr. Nickerson:

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(869) Q. In 1952 after these incidents, did you apply for a renewal of the franchise? A. Yes, I did.

(870) Q. Did you receive Defendant's Exhibit BP (handing)? A. Yes, I did.

Mr. Nickerson: I offer it in evidence.

The Court: You received it from whom?

Mr. Nickerson: From the Ministry, your Honor.

The Witness: From the Ministry of Communications.

The Court: Is there any objection to receiving BP in evidence?

Mr. Schoenwald: I haven't seen it before.

Mr. Nickerson: I thought he had seen it. I am sorry.

Mr. Schoenwald: Never.

Mr. Nickerson: Mr. Schoenwald, may I go on while you are examining it?

Mr. Schoenwald: Yes, go ahead.

Q. Colonel Marcano, prior to August 18, 1951 which is the date of Defendant's Exhibit BN in which the Ministry of Communications asked the Foreign Relations Department, tells the Foreign Relations Department that they had renewed, that they had authorized the renewal of international air service, (871) did you advise the Ministry orally of your arrangements with USOA?

Mr. Schoenwald: Objection. Your Honor, we have documents indicating that the witness advised the Ministry. There is one in evidence and one you don't have in evidence. Oral communications between this witness and the Ministry, in view of the circumstances, in view of the existence of the documents, would certainly be objectionable.

The Court: I will permit you to reserve your right to move to strike out. I think it would be—

Mr. Nickerson: I am not asking him what the Ministry said. I am just asking what he advised them.

The Court: I will allow it.

Mr. Schoenwald: May I have a continuing objection to this whole line as it continues?

The Court: Yes.

A. Yes, I did advise them orally.

Q. What did you advise them, in substance? A. In substance I advised them that USOA was going to do the operation for us.

Mr. Nickerson: Have you examined that? I would like to offer it in evidence.

(872) Mr. Schoenwald: I object on the ground that it was after the event, your Honor. With respect to the question of fraud, in so far as we claim that we were misled at the time of the contract, and this speaks of events after the contract, I would object to its being admitted in evidence.

Mr. Nickerson: Your Honor, it is offered for the purpose of showing our damages and loss of franchise.

Mr. Schoenwald: Then I am going to make the further objection that there is nothing in this document which is at all relevant to the loss of franchise, and I think the terms of the document do not even suggest that it is lost, but it may be contingent.

The Court: Yes. I will allow it, but I call your attention to the fact that under the express terms of this document it does not purport to show any loss of franchise.

Mr. Nickerson: I have to ask another question. This is just preliminary, your Honor.

The Court: Do you agree, then, that the tenor of this document is that the Venezuelan Government was maintaining a status quo?

(873) Mr. Nickerson: Correct.

The Court: Pending performance by the franchise holder?

Mr. Nickerson: Yes, and pending the showing, which of course he couldn't show, that he had conducted his scheduled operation.

The Court: BP is marked in evidence for whatever it is worth.

(Defendant's Exhibit BP for identification received in evidence.)

Q. Did you subsequent to Defendant's Exhibit BP lose your franchise? A. Yes. The franchise was given to Linea Aero Postal Venezolana.

Q. I show you Defendant's Exhibit BI for identification and ask you if you received that from the Director of Transportation of the Ministry of Communications of Venezuela.

Mr. Nickerson: You have seen that. I offer it in evidence.

A. I haven't seen the document.

(Document handed to the witness.)

A. Yes, I did.

Mr. Schoenwald: This document relates to (874) 1950. I don't see that it is relevant to any of the issues. We concede that the franchise they got 1949 was renewed for the year 1950.

Mr. Nickerson: Your Honor, this is also offered on the question of proof of damages for the loss of franchise, namely, reasonable expectation.

The Court: This document, BI, purports to grant an extension pending performance by Colonel Marcano's company. Is that right?

Mr. Nickerson: Yes, but the point I am trying to make with the document—and I won't take but a sentence—is that the five-year period which they mention there, that it would have been a reasonable expectation—this is going to be my argument—

The Court: If he could have performed.

Mr. Nickerson: —If he could have performed.

The Court: I will allow it.

(Defendant's Exhibit BI for identification received in evidence.)

Mr. Nickerson: I now offer in evidence what has previously been identified as the letter from Colonel Marcano to the Director of Civil Aeronautics of the Ministry of Communications dated August 14, 1951, Defendant's Exhibit BN for identification.

(875) Mr. Schoenwald: With respect to this document, your Honor, I draw to your attention, number one, that all of the documents previously introduced by way of correspondence with the Ministry have had some identification that they were received in the files of the Ministry, and that this document lacks it. However, more important, your Honor, I draw to your attention that the first sentence of this letter refers to a document from the Ministry that Colonel Marcano characterized as No. 919, which is in between the letter of the Colonel to the Ministry of July 10th, which is in evidence, and

these documents, which are intended to be put in evidence, and that without this intervening document No. 919, we cannot appreciate the significance of it, we don't understand it—

Mr. Nickerson: All right, your Honor, I will withdraw it because I haven't that in my files.

Q. In 1951, Colonel Marcano, could you tell us what kind of government Venezuela had?

Mr. Schoenwald: I don't understand that question.

The Court: I will allow it.

Mr. Nickerson: I am trying to shorten it, your Honor.

(876) The Court: Wait for the answer.

Q. Could you tell us? A. Yes, it had a de facto government.

Q. What was the de facto government, what was it composed of? Did it have a legislative branch? A. No, it did not at that time, no.

Q. Only an executive branch? A. An executive branch.

The Court: Was it headed by a military junta?

The Witness: At that time it was not a military junta because the military junta was ended in November by the death of the head of the military junta. This remained as the Junta de Gobielarno

Q. Now the other day in your cross-examination I asked you whether you forwarded copies of the Alitalia interline agreement and the so-called operation brief to the Ministry of Communications, translating them into Spanish. Do you recall you answered yes? A. Yes, I do.

Mr. Nickerson: Those exhibits, your Honor, are Defendant's Exhibits AR and AS for identification.

Q. I am now showing you Defendant's Exhibit AV and ask you if you can tell us from looking at that what (877) the date was that you forwarded those to the Ministry. A. September 12th.

Mr. Schoenwald: May I see that document?

Mr. Nickerson: Yes.

The Court: September 12th what year?

The Witness: 1951, your Honor.

Q. That was right after you got back from Rome, when you came back from— A. Yes.

Mr. Schoenwald: Do you have a translation of this?

Mr. Nickerson: It is identified as AS.

Q. Subsequent to the time you sent Defendant's Exhibit AV, did you receive from the Ministry of Communications Defendant's Exhibit BO for identification? A. Yes, I did.

Q. I show you Defendant's Exhibit BS for identification and ask you whether or not that was the permit that you received granting you certain rights in Bermuda? A. This is it.

Q. Or a copy of it. A. A copy of it, yes.

(878) Q. Was that ever revoked? Do you know whether or not that was ever revoked? A. That was never revoked, no.

Mr. Nickerson: I offer it in evidence.

Mr. Schoenwald: I object. This is not adequately or properly authenticated, and it is cer-

tainly demonstrated by this time, if your Honor please, that counsel well knew the form of preparing properly authenticated documents. As a matter of fact, this lack of authentication is not merely a technical difficulty, because I think we have documents subsequent to the date of this to show that the rights which this purports to give did not in fact exist.

Mr. Nickerson: Your Honor, I won't comment.

The Court: I don't think that you can introduce this as primary evidence, but—

Mr. Nickerson: I don't have it, your Honor. I tried to get certification, and if you would like a letter from the lawyer on it, I will be glad to submit it to your Honor.

Mr. Schoenwald: Your Honor—

The Court: Yes.

Mr. Nickerson: This is in fact the permit.

The Court: Will you show me the letter.

(879) Mr. Nickerson: Yes.

Mr. Schoenwald: Sir, is that instrument that you have before you dated?

The Court: Yes. October 31, 1950.

(Document handed to the Court.)

The Court: In view of this letter which was addressed to Mr. Nickerson by a firm of attorneys in Bermuda, indicating that the Exhibit BF is in fact a permit and that they are unable to understand what he means by authentication, I will allow it because I think he has made a sufficient showing of good faith in his attempt to get it.

Mr. Nickerson: I shall show the letter to Mr. Schoenwald.

The Court: Yes, show it to Mr. Schoenwald. Mark that in evidence.

(Defendant's Exhibit BF for identification received in evidence.)

Mr. Schoenwald: If your Honor please, I would like to note my objection and call to your Honor's attention that we have had similar difficulties and we have made no effort to introduce documents that we could get admitted because of a lack of authentication, and we have a number of letters from (880) attorneys and opinion from attorneys about all of these matters which we have not to this time offered because we thought that they were self-serving.

I would like an opportunity to produce all the correspondence that we have from attorneys or notes from attorneys showing what they thought of this problem.

The Court: I will apply the same rule to you that I have applied to Mr. Nickerson, so don't feel that you are under any impediment.

Mr. Schoenwald: All right.

Mr. Nickerson: I offer Defendant's Exhibit BO.

Mr. Schoenwald: I am going to object to this on two grounds. I understand that this letter is being offered to demonstrate that the rights to Germany, which was the subject matter of the Alitalia agreement, were ultimately obtained, and this document does not indicate that these rights were obtained and, as a matter of fact, it is after the event, it is on October 20, 1951. And, further than that, even if this document contained a statement that the German Government had consented to such rights, which it does not, this would not be the best evidence.

(881) The Court: For what purpose is this offered?

Mr. Nickerson: This is offered to show that with respect to the Alitalia agreement, which they have

made the point of, and the request for German and Swiss rights, we in good faith applied for it as we were asked to do and in fact we got this document indicating that we could have it, provided that we showed that we could have adequate facilities in order to do it.

Mr. Schoenwald: I don't want to argue the meaning of the document, but I do feel this is a misapprehension. While this letter comments upon the lack of facilities, there is no indication that the German Government in any event consented to the issuance of these rights, and I thought counsel had stated earlier during the course of the trial that he was going to produce a document to show rights from Germany. If this is the document that counsel had in mind with respect to that, I submit that it does not do so and should not be accepted in evidence for the purpose of showing that the German Government had consented to rights, conditional or unconditional.

The Court: I don't think that it shows a (882) firm commitment by anybody, but it does show an effort in the direction of securing a commitment, and that is all that it shows. It has a very slight probative value, but is of some probative value.

I will allow it.

(Defendant's Exhibit BO for identification received in evidence.)

Mr. Nickerson: I offer Defendant's Exhibit AM, which has already been seen by counsel, which is the letter that the Colonel got from the Foreign Relations Department to the Ambassador of Venezuela in Rome. It has previously been identified by the Colonel.

Mr. Schoenwald: I wish to call your attention, Mr. Nickerson, that I have never seen the letter before.

Mr. Nickerson: I showed that to you the other day.

Mr. Schoenwald: I object to it because it is irrelevant and because it is not properly identified as a government document.

The Court: This is an official communication or purports to be from the Foreign Relations Department to the Venezuelan ambassador in Rome, and is in effect a letter of recommendation on behalf of Colonel Marcano.

(883) Mr. Nickerson: It shows his good faith in taking that over when he went over to Rome, as he testified.

The Court: I will allow it solely for the purpose of showing that it was used by Colonel Marcano in connection with his activities in Rome, and for no other purpose.

(Defendant's Exhibit AM for identification received in evidence.)

Mr. Nickerson: Now, your Honor, I am offering Defendant's Exhibit BV, which is a letter subject to our stipulation, and it is the same as Plaintiff's Exhibit 140 for identification. And the purpose of my offer is this, if I might just state: there is already in evidence a letter dated August 20, 1951 from Fletamar in Madrid, the translation of which purports to say that at the moment air traffic for immigrants is not authorized, and I offer this letter on that subject to show that at the time the letter is dated, September 14th, that that was not the fact.

The Court: This is a letter from—

Mr. Nickerson: From Fletamar.

The Court: That is the agency in Madrid, to Colonel Marcano?

(884) Mr. Nickerson: Well, it is actually to Caracas, but it is for the president, to the attention of the president.

The Court: President?

Mr. Nickerson: Colonel Marcano.

Mr. Schoenwald: I am going to object on the ground that, as your Honor has stated, this is a communication between defendant's agent and the Colonel and in no way binding upon us and no indication that it was communicated to us.

The Court: Obviously they were conducting a business, not preparing for a lawsuit. These letters are offered as part of the cause of action of the company in the regular line of their business as a business communication. What objection do you have to it?

Mr. Schoenwald: In other words, it is self-serving, in so far as we are concerned, it is not binding upon us.

I would also like to suggest that in so far as the count on fraud is concerned, that this is dated September 14, 1951. The fraud count must relate to events preceding the execution of the contract. Anything which may have occurred subsequent to the contract—

The Court: But if it is admissible for any purpose, even to the question of determining the (885) damages and even to the extent of possible diminution of damages and the value of the franchise at various times, it still would have some probative value.

Mr. Schoenwald: I can understand that. I would like to reserve, with your Honor's consent, my objection to all the documents subsequent to the date of the contract in so far as they may relate to efforts to cure the fraud because it will be my contention and it has been my contention—

The Court: They are not attempting to cure any fraud because they claim definitely they never committed a fraud, so nothing is being offered to cure something that they don't claim exists.

Mr. Schoenwald: May I have a reservation?

The Court: You may have a reservation to move to strike out this letter to which you are now objecting and I will allow it because I believe it may have some bearing on matters, the question of the amount, if any, of any damages, and the question of the value of this franchise at that time.

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(886) By Mr. Nickerson:

Q. I show you Defendant's Exhibit CE for identification and ask you whether those are the settlement agreements that you made with Near East Transport and James A. Wooten. A. Yes, I did.

Mr. Nickerson: I offer those in evidence.

Mr. Schoenwald: We don't have any objection to these.

(Defendant's Exhibit CE for identification received in evidence.)

(887) Q. Colonel, when USOA started to fly the operation, I believe the first flight started August 19th from

Caracas to Europe, were there Venezuelan co-pilots on the plane? A. Yes.

Q. Were there any other crew members? A. Yes.

Q. Tell us what the Venezuelan personnel were on the plane. A. Co-pilots, radio operator and hostesses that either if they were sovereigns, appropriate Venezuelan sovereigns, they were Venezuelan residents.

Q. And the balance of the stewardesses were Venezuelan? A. To my recollection, yes.

Q. Do you recall, Colonel, and I think it has been testified, that you had a prior arrangement during 1950 with Near East and with the Flying Tigers? A. Yes.

Q. Can you tell us whether you advised the Ministry of Communications of the arrangements that you had with Near East and the Tigers? A. Yes, I did.

Mr. Schoenwald: Objection. No relationship to this transaction, self-serving, hearsay.

(888) The Court: I sustain the objection.

Mr. Nickerson: May I explain this, because on the law point, where he said that this is illegal under the federal Constitution, I believe it is, and I want to prove he already had a similar arrangement with Near East and with the Tigers, he advised them fully of it, they had 45 percent of the stock, they conducted the traffic and so forth, and the Ministry had no objection to it. That is a construction by an executive branch of the government of what that provision means.

Mr. Schoenwald: If your Honor please, oral conversations between this person and the government, of which we have no evidence, dealing with the situation before we entered into the contract, dealing with an entirely different contract, where airplanes were purchased, and where there is no evi-

dence to show that the contract between us and Near East and the Flying Tigers is the same, it certainly is an unfair and improper means of producing evidence of this kind, which is the subject matter for expert opinion on the law.

Mr. Nickerson: I am not asking for an opinion. I just ask what the facts were.

The Court: The conduct of the parties (889) pursuant to any kind of agreement, whether it be a franchise or a bilateral contract for the purchase is always of interest, because by their conduct they give meaning and interpretation and significance to the clauses of the contract, and obviously the course of conduct between Colonel Marcano and his company and the Venezuelan Government pursuant to the provisions of this franchise, are of some value in determining what was meant by both parties with respect to any of the provisions of that franchise.

You can argue the weight of that evidence and you have available to you any argument you may wish to make on that, but to exclude it, it seems to me, is to take a piece of the truth out of the situation.

Mr. Schoenwald: I also feel that the franchise which is presently before the Court was not even in existence at the time of the negotiations with the Tigers and Near East airlines, and I think we have had testimony by the expert witness, and it has not been contradicted by the expert for the defendant, that the waiving of a requirement, if indeed there was a waiver, in no way vitiates the right of the government to subsequently make a complaint.

The Court: That is a matter for the ultimate (890) decision as to the facts. At this point the

facts are controverted, and what the conduct of the parties was, I think, is of some probative value in order to ascertain the meaning and intention pursuant to the franchise or any other written agreement they had.

Mr. Schoenwald: Would the franchise not be in effect, the same franchise be in effect—

The Court: You may cross-examine. I will allow the question.

Can you recall the question?

The Witness: Yes. I think I answered it.

By Mr. Nickerson:

Q. You answered? A. I said yes. The Air Ministry was advised of the arrangement.

Q. And you advised them that the Flying Tigers and Near East had 45 percent of the stock? A. Yes.

Q. And what else did you advise them? A. We advised them that we were going to furnish operation on the contract for traffic.

Q. Did you receive Defendant's Exhibit AE on or about the date it is dated? A. Yes, I did.

(891) Mr. Nickerson: Do you have any objection?

Mr. Schoenwald: I haven't seen it.

No objection to this.

(Defendant's Exhibit AE for identification received in evidence.)

Q. You have heard some testimony with respect to Webb going back—speaking about going to try to get a bill of sale to show his part ownership in the airplane.

Did you at any time, Colonel, urge Mr. Webb or Mr.

Burger or anyone else to go to USOA and get a bill of sale? A. No.

Q. Did you acquiesce in that? A. No.

Q. Did you conspire to do that? A. I never had anything to do with it.

Q. Can you tell us whether or not you told Mr. Webb that—

Mr. Schoenwald: This has all been leading as to form. The first ones were definitely leading. If he is going to continue leading the witness, I am going to move to strike it out.

The Court: Wait until he asks the question.

Q. Do you recall whether or not you told Mr. (892) Webb that the bill of sale was his concern?

Mr. Schoenwald: Objection.

Mr. Nickerson: That is not leading.

Mr. Schoenwald: It is leading.

The Court: Ask the witness.

Q. What did you say to Webb with respect to the bill of sale to show his interest in the airplane? A. I listened to him. It was none of my business, it was his own business, and I didn't interfere with him. I had nothing to do with that.

(Defendant's Exhibit CF marked for identification.)

Q. I show you Defendant's Exhibit CF which shows certain payments received by and certain payments made by CAVE or billed to CAVE. Can you tell us whether most of those statements were received by and paid out or billed to CAVE? A. Well, I have examined it, and they were received, the money was received and some were paid and some were billed to CAVE as stated there.

Q. It shows on the statement? A. It shows on the statement, yes. I examined the statement.

Q. With respect to a heading on that Exhibit (893) CF for identification, headed "Equipment," are you personally familiar with the value of the items there listed? A. Approximately.

Mr. Schoenwald: Your Honor, I don't know what the items are, so I am not in a position to object to it.

The Court: Show it to him.

Mr. Nickerson: Maybe you have seen it.

Mr. Schoenwald: I have never seen this paper before. All right.

Q. Can you tell us approximately the value of those? A. Yes. I put it down as $25, approximately.

Q. I show you a sheet on that exhibit entitled "Cargo Manifests—Rome—Flight No. 1—Flight Equipment Taken on Board the Aircraft YVCCAB." Can you tell us what those items were? A. They were a few things left in Rome from our stores that were sold to TAI when we sold the items, those were left.

Q. Were or were not these items which you turned over to the USOA? A. Yes.

(894) Mr. Schoenwald: I am going to object. There is no indication that he knew or the source of his knowledge; just a mere conclusion by the witness.

The Court: If he knows he may state it.

Q. Are you personally familiar with the value of those? A. Yes, approximately.

Q. What is the value? A. $380.

Q. What was the cost of your ticket to Rome, Colonel, when you went from Venezuela to Rome in August 1951? A. I don't know the exact cost but it was about $525.

Q. Can you tell us approximately?

The Court: Roundtrip?

Mr. Nickerson: No. He came back on the AVE plane, your Honor.

The Court: $525 one way.

Q. Can you tell us approximately what your expenses were in Rome in connection with the AVE operation from August 25th, I believe you testified you got there, until September 9th, when you left? Can you give us— A. About $480.

(895) Q. So if we rounded that off at $420 it wouldn't be inaccurate.

Mr. Nickerson: Now, your Honor, I am about to make certain concessions with respect to this document. If I may explain this, it is an accounting which is made up which shows receipts and disbursements. Certain of them we concede are not chargeable to USOA because they relate to traffic which Colonel Marcano took on in Caracas at a 12½ percent commission, and rent and taxes and so forth, and with respect to certain individuals in Europe which we can't determine from the statement were working or what proportion of their work was for USOA and what proportion for AVE, so we have thrown those out entirely. So that I may concede that the items relating to traffic personnel in Caracas, European payroll, rent and taxes, and Lisbon general expenses are not chargeable to USOA, though they are on this statement, and for your Honor's information I come out with a total figure of $23,058.82.

I offer it in evidence.

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(897) The Court: He has withdrawn it.

By Mr. Nickerson:

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(901) Q. Now, Colonel, since you last testified have you been examining the books of AVE with Mr. Zinman, who is on my right? A. Yes, for the last five days, any time I had available, was passed with Mr. Zinman over the CAVE books.

Q. Can you tell us what your instructions were in preparing the statement of estimated assets and liabilities which appears in Plaintiff's Exhibit 357?

Mr. Schoenwald: Objection. That has already been testified to.

(902) Mr. Nickerson: I do not think it has been, your Honor, but in any event—

The Court: I will allow him to repeat it.

A. My instructions to Mr. Morgan, who was my accountant, was to make this estimated statement a very conservative one; in other words, to show just the moneys that could be readily cashed, I mean, that he knew exactly what in cash was in our bank account.

Q. I show you Defendant's Exhibit CC for identification and ask you whether you can identify the handwriting on that. A. Yes. This is Mr. Morgan's handwriting.

Q. The two hundred and sixty-one thousand-odd dollars which appears on the statement of estimated assets and liabilities as at June 15, 1951 was, I think you testified, the amount of pesetas that you had in Spain, was it not? A. Yes.

Q. You had other amounts, did you not, or, rather, you had other agencies which had sold tickets for you, had you not? A. Yes.

Q. Can you tell us why the other agency accounts were not included in the statement of Plaintiff's (903) Exhibit 357? A. They were not included because most of that money, I mean, the operation was carried out in such a way that our Caracas office would pay its expenses and part of the maintenance and part of the crew pay. Lisbon and Rome would pay all the food, part maintenance and part crew pay and their own expenses, so I didn't know how much money was going to come from those stations in cash. I knew bills would be paid over there for different purposes and that some money would come back in cash but I didn't know how much money, actual cash would come back, so I didn't want to put it in this statement because I wasn't sure what money will be actually received in cash.

Q. Did you write off any of these accounts in France, Lisbon, Rome? A. No, none of those were written off, no.

Q. I show you Plaintiff's Exhibit 42-A for identification and ask you whether that is your tax return for the year 1950? A. It is, yes.

Q. Is that your signature on it? A. That is my signature.

Q. Dated April 27, 1951. A. Yes.

(904) Mr. Nickerson: I offer it in evidence.

Mr. Schoenwald: No objection.

Mr. Nickerson: Your Honor, that shows the same amount that we had in the Gotch & Crawford study.

(Plaintiff's Exhibit 42-A for identification received in evidence.)

Q. Who did the work in preparing that return, who in your office? A. The accounting department, Mr. Morgan.

Q. Can you recall whether he made any trips in connection with preparing that return? A. Yes. Mr. Morgan

left Caracas in early February and he visited all stations, he went to Lisbon, he went to Bermuda, he went to Madrid, to Paris and to Rome, and he gathered all the information he wanted to complete this final December balance.

Q. By April 27th, when that return is dated, 1951, were the accounts for 1950 in the European offices or agencies settled? A. They were all settled, yes; by that time, yes.

Q. Colonel Marcano, did your local operation, national operation, sell any tickets? A. No, no tickets.

(905) Q. Did it carry mail, parcels or excess baggage? A. No.

Q. With respect to employees' accounts, have you seen any employees' accounts when you were going over the books? A. I saw them; yes.

Q. Can you tell us whether those had anything to do with the 1950 operation? A. No, not with the operation.

Q. What were they? A. They were advances to employees.

Q. Have you seen certain sundry accounts on the books with Mr. Zinman? A. Yes, I have.

Q. What do those consist of? A. Those consist of different things that were paid—I mean advances or— it had nothing to do with the operation itself.

Q. Were any of those loans? A. Yes, a few loans.

Q. In connection with the sale of the two airplanes did you pay any legal expense? A. Yes, I did.

(906) Q. How much? A. Ten thousand dollars I think it was. Yes, ten thousand.

Mr. Nickerson: That is all, your Honor.

Cross Examination by Mr. Schoenwald:

Q. The $500,000 that you had in accounts receivable at the end of April 1951, that was money largely earned during 1950, wasn't it? A. No.

Q. As a matter of fact, what was your gross income during 1951? A. 1951? I think it was one million two hundred and some-odd—

Mr. Nickerson: No, you mean 1950.

Q. During 1951. A. 1951, one million, grossly, one million two hundred and some-odd bolivars.

Q. How much is that in dollars? A. That is about three hundred thousand.

Q. So, as a matter of fact, in 1951 your whole income wasn't equal to the $500,000 you had in accounts receivable at the end of 1951; isn't that right? A. I beg your pardon?

(907) Q. At the end of April 1951 you had 500,000 in accounts receivable; is that right? A. Yes.

Q. Your whole income during 1951, including income accrued, wasn't more than 300,000 or 400,000? A. Yes.

Q. So a substantial part of those accounts receivable, if not all of them, were earned during 1950; isn't that right? A. May I have the question?

The Court: That is not disputed, is it?

Mr. Nickerson: No.

Q. Then the 500,000 was earned during 1950 or a substantial part of it?

Mr. Nickerson: Some part was earned in 1950.

Q. At least half of it?

Mr. Nickerson: I am conceding—

The Court: The question was a substantial part of the accounts receivable were earned in 1950. I understand that that is conceded.

Q. By the time this prospectus was prepared, apparently you decided that it wasn't clear that this money would be received by the company; isn't that right? A. I beg your pardon?

(908) Q. By the time the prospectus was prepared you had apparently decided that it wasn't clear that you had received this money? A. Which money?

Q. This 500,000 in accounts receivable. A. Those moneys were all received.

Q. You did receive them by 1951, June 1951? A. I had not received them but they were later on received, all of them. I never wrote one dollar off the—out of that.

Mr. Schoenwald: I am going to move that the answer be stricken as not responsive.

The Court: I suggest you rephrase your question so that it is short and clearer. You see, moneys keep going in and going out. I think there is an element of confusion in your question because according to this so-called prospectus most of this money had come from the sale of the DC-4s and a lot of that money had been used to pay outstanding obligations of the company, so you can't say money received in 1950 is still there in 1951. There is a constant ebb and flow of funds going on.

(909) Mr. Nickerson: Further, your Honor, I think he is confusing the witness. He is confusing with respect to agency accounts and employee loans and advances which of course were written off.

Mr. Schoenwald: I don't want to add to the confusion, but I think that your Honor, too, is under a misapprehension.

The Court: Then try to clear me up, too. You have three of us to clear it up for.

Mr. Schoenwald: Did your Honor indicate that the prospectus—I am not cross-examining you of course—that the prospectus said that the money received was from the sale of the airplanes, that the profits were from the sale of the airplanes?

The Court: No. I was directing my attention to the statement appearing on page 5, which says: "The two DC-4s were sold in May 1951 and proceeds used in part to meet all outstanding obligations of the company," and the previous testimony which I understand you elicited, I believe you elicited, was to the effect that this was a substantial amount of money which came into Colonel Marcano's company and which was directly attributable to the sale of these two airplanes.

Mr. Schoenwald: I would like to suggest that there is nothing in the prospectus which shows that the airplanes were the personal property or—other (910) than personal property of the company, or, as a matter of fact, that there was a profit on them. For all you can tell from the prospectus, the planes were bought for $1 million and sold for $1 million.

The Court: No, but the testimony which you have already elicited indicates that there was an amount of money received used to pay outstanding debts.

Mr. Schoenwald: But that wasn't in the prospectus.

The Court: They say a substantial amount. Rephrase your question, please, Mr. Schoenwald.

Q. Do you have any papers here or anywhere in the books to show that the accounts receivable were collected? A. In the books? We only have the books here to April 30, 1951.

Q. Where are the books for May and June? A. The books are there.

Q. No. Where are the books for May and June? A. The books, there, they are the books.

Mr. Nickerson: They are not kept, your Honor. It shows on the face they were not kept after April 30, 1951.

The Court: It is conceded that the books (911) were not kept after April 30, 1951.

Q. Now when did you collect this 500,000 which you had not yet collected by June?

Mr. Nickerson: Your Honor, I object to go forward into the millennium, since we have started from the Iliad.

Mr. Schoenwald: I propose to show that this money was never collected and I think I have some documents here which may tend, with the witness's testimony, to confirm that.

The Court: That what money was never collected?

Mr. Schoenwald: This 500,000 was never collected.

The Court: What $500,000?

Mr. Schoenwald: The 500,000 that the witness testified were accounts receivable that the company had at the end of April 1951 and also had at the end of 1950, which were a part of the $1,717,000 they grossed in 1950 and a part of the alleged $58,000 operating profit for 1950, that this 500,000 never existed and was never collected, and the defendant knew—

The Court: Put the direct question to him.

Mr. Schoenwald: I wonder if the question should be read.

(912) The Court: I am not going to let you go into an extensive exploration of this company's finances before you had anything to do with it. What we are concerned with here is the circumstances surrounding the alleged prospectus on the contract.

Mr. Schoenwald: I want to go into so much of this company's finances as relates to the truth of the statements contained in the prospectus.

The Court: That is what you are doing and that is what I am going to permit you to do and nothing more than that.

Mr. Nickerson: He has not said that was collected. It isn't fair.

The Court: I sustain the objection on the ground that it is improper in form, confusing and argumentative.

Q. Did you ever collect the 500,000 that was owed to the company at the end of April 30, 1951?

Mr. Nickerson: He has already said that he paid some expenses with it. I don't think it is, honestly, a fair question.

The Court: I think Colonel Marcano has already testified that the company had accounts receivable in the amount of approximately 500,000. Is that right?

(913) The Witness: Yes.

By the Court:

Q. Where did you have those accounts receivable? A. That was—half of it was the 261,000 in Spain. The rest was in Lisbon, Madrid, Rome and Paris.

Q. As of what date did you have those? A. As at the

time we are talking of, April 30th, and those funds in those stations were used to pay bills for maintenance, food, crew pay sometimes, running the office, and the rest would come back in cash.

Q. How much if any was ever collected by the firm's treasurer in Caracas? A. In cash? I would say about 20, 25 percent, not more than that.

Q. About 25 percent? A. Yes.

Q. The rest was expended to meet debts of this office for operational bills? A. Yes.

Q. Rome, Lisbon and Paris? A. Rome, Lisbon, Paris and Santa Maria.

Q. The Azores? A. The Azores. These offices—

(914) Q. That is all right, you have given your answer.

The Court: You can take it from there.

By Mr. Schoenwald:

Q. This money that was spent in The Azores, Lisbon, Rome and so forth, is money that you never actually received in Caracas; isn't that correct? A. Not in cash, no.

Q. As a matter of fact, when you prepared your statement at the end of April 1951 covering the period of 1950, upon which the profit of $58,000 is based, you didn't indicate that money hadn't been received, you listed it as a full asset, didn't you? A. It was a full asset. We had money in Spain. The pesetas were in Spain, in the bank in our name.

Q. What about the other money that was never collected by you that was kept by the people in Europe to pay expenses?

Mr. Nickerson: Your Honor, I object to that because he is implying in his question that those were not—

The Court: Yes.

Mr. Nickerson: —expenses in 1950. He had a month and a half where he had no income and he had to keep these offices—

(915) The Court: I sustain the objection on the ground the question is meaningless.

Q. There isn't any question in your mind, is there, Colonel, that at the end of April 30, 1951 you had 600,000 of accounts receivable? A. Five hundred pesetas or—

Q. Between 500,000 and 600,000? A. Whatever the books showed I had.

Q. You have looked at the books for the last five days. Can you tell us? A. About 500,000. I don't know exactly. I don't know the figure.

Q. There isn't any doubt that by June 15, 1951 these were reduced to 140,000? A. If it is so in the statement, it was reduced in the statement, the estimated statement.

Q. Did you collect the money between April 30, 1951 and June 15, 1951? A. My books would show, and I have been working with Mr. Zinman—

Q. Do you know whether you collected this 500,000 between April 30, 1951 and June 15, 1951?

Mr. Nickerson: I am coming back to the same thing. His question implies something that he has (916) already testified isn't so.

The Court: Did you collect in your treasury in Caracas the difference between the round figures of 150,000 and the round figure of 500,000 that Mr. Schoenwald has been asking you?

The Witness: No, sir, that wasn't taken into consideration.

Mr. Schoenwald: I don't think that is the answer to the question whether or not he collected it.

The Court: No. The answer is no?
The Witness: No.
The Court: It wasn't collected.
The Witness: Not collected.

Q. Did your company have an non-operating loss during 1950 or 1951 in excess of $20,000? A. No.

Q. Was the money from the sale of the airplanes all consumed within a few weeks after you received it in May 1951? A. Yes.

Q. Was it not used to pay all the debts of the company at that time? A. Used to pay debts of the company and other payments under this.

(917) Q. How much were the debts of the company in May 1951 or May 1st or April 30th?

Mr. Schoenwald: Have you got the balance sheet?

A. I would have to refresh my recollection. I have seen the books but I don't have—

The Court: In round figures can you state what the total debts of your company were in April?
The Witness: The total debts were roughly close to a million dollars, roughly. I don't know exactly.
The Court: Close to a million dollars.
The Witness: Close to a million dollars, a round figure. I wouldn't know exactly how much.

Q. You used the airplane money to pay all those debts? A. We did do that, yes.

Q. At the end of that time you still had 500,000 left from accounts receivable? A. Yes.

Q. Where is that money today? Was it ever collected? A. Yes.

Q. When was it collected? (918) A. It was collected after June 15th—either collected or paid out—

Q. In debts? A. Not in debts; in expenses of operation in our European run.

Mr. Nickerson: Your Honor, I think he is confusing the witness, if I may just interject here, with respect to the agency accounts and with respect to employees' loans and so forth.

The Court: That may be.

Mr. Nickerson: There wasn't any 500,000 in the agency accounts receivable, your Honor.

Q. Weren't the agency accounts receivable by the end of April 446,000? A. If the books say so they were, yes.

Q. Isn't that approximately your recollection as to what they were? A. Around, yes.

Mr. Nickerson: I am sorry. That is right.

Q. About this $446,000 that was collected after June or spent on expenses after June, will you tell us what expenses after June you spent the 446,000 on. A. On all operations, bills or expenses incurred during 1951.

(919) Q. What operations did you conduct after June 1951?

Mr. Nickerson: I object to what—

The Court: Sustained. These were debts incurred prior. Are you leaving that to go to another subject?

Mr. Schoenwald: No.

The Court: How can you take care of future debts not yet incurred? His answer forecloses your question because his answer was that he used them to pay outstanding debts and expenses.

Mr. Schoenwald: I think the witness testified that the outstanding debts and expenses as of June 1951 were approximately a million dollars, that these debts were fully paid by the proceeds of the airplanes, also approximately a million dollars. That I think leaves the witness with 450,000 left after June 1950. I am trying to trace what he did with this other 450,000 for the purpose of demonstrating that he never collected it or never earned it.

The Court: Ask him whether after—what is the date? June 1950?

Mr. Schoenwald: June 1951.

The Court: Whether he had 400,000 available.

(920) Q. Did you have 400,000, 446,000 available? A. I had 261,000 available in Spain and the rest was paid out. Our system of accounting came in clear after two months and a half, so by June I didn't know what was spent. Maybe in April, May, June—March, April May, I didn't know any way—I had no way of knowing.

Q. Did you have this other 250,000 after June 1951? I don't think you have told me the answer to that at all. A. I beg your pardon?

Q. Did you have the other 250,000 after June 1951?

Mr. Nickerson: I don't know what he means.

The Court: I don't know either. Objection sustained.

By the Court:

Q. Your testimony, Colonel, as I understand it, is that in June 1951 you had approximately 261,000 in your Madrid agency account. A. Yes, sir.

Q. And that is all you had? A. That is all I put on the—

Q. On the statement? A: —on the statement, because I wanted to have (921) the statement show exactly what we had in cash in our bank account.

Q. Did you have another 250,000 apart from that that you didn't put on the statement? A. There was that amount in the agency that I did not put on the statement because I did not know how much cash would come out of that account, so I did not put any estimate.

Q. So you did not attempt to estimate? A. I didn't know.

Q. You kept it out of the statement? A. I kept it out of the statement, yes, sir.

Q. How much was it that you kept out of the statement? A. I would say about 225,000, $220,000, something like that.

Q. So you did not attempt to estimate? A. I didn't know.

Q. You kept it out of the statement? A. I kept it out of the statement, yes, sir.

Q. How much was it that you kept out of the statement? A. I would say about 225,000, 220,000, something like that.

(922) Q. Was that used at the various stations to take care of bills at those stations? A. Yes.

By Mr. Schoenwald:

Q. When was it used? A. Whenever the bills came due.

Q. Was it used during 1950? A. No. These were not 1950.

The Court: You see, Mr. Schoenwald, you are bringing out that he had money that isn't shown on the statement, that it was used for purposes for which you are not concerned. I don't get the purpose.

You are in the position of the aggrieved creditor here, showing that he had more money than he actually showed on the statement.

Mr. Schoenwald: No.

The Court: How can it possibly help you?

Mr. Schoenwald: I think that—

The Court: He has said time and time again that this $261,000 on page 6 was money that was in Madrid. You are bringing out he had other money. You are asking him what he did with it and his—

Mr. Schoenwald: No I think a statement of what I hope to show by this line of questioning would (923) be helpful.

The Court: All right. Go ahead. I haven't yet perceived the usefulness of it.

Mr. Schoenwald: And that is that the statement that he made of $58,000 operating profit during 1950 is inaccurate; the statement that they grossed $1.7 million during 1950 is inaccurate, and that the profit figures for 1949, 1950 and 1951 on page 6 are inaccurate.

The Court: You have been over that already, haven't you?

Mr. Schoenwald: I am trying to nail it down with the Colonel. It is your Honor's suggesting that I am injuring my own position with the line of questioning I am developing which gives me the feeling that I haven't succeeded in telling your Honor what the point of my line is.

The Court: I know what you are contending, but you can't prove a case through testimony which won't substantiate those contentions.

Mr. Schoenwald: If the Colonel could show us that he actually had recovered this 500,000, if he could prove to us what the expense was after and what expenses existed, what he could possibly have spent it (924) for, it might be that there was some justice to his position, but until the Colonel can show us that he got this 500,000, which we say never existed, and until he can show us that he had expenses after

June '51 to spend it on, that there was in existence such a sum of money which he claimed to be in existence, then we must assume that it never existed. I am trying to get the Colonel's testimony that the money did exist.

The Court: I can't understand. It is pure speculation, argumentative, and it is not a proper basis for examination of the witness.

By Mr. Schoenwald:

Q. Colonel, who were the administrative personnel of AVE during 1951? A. During 1951?

Q. Who were the administrative personnel of AVE? A. The Board of Directors was Mr. Salazar, Mr. DeCastro and myself as principals.

Q. How about the administrative personnel? Who were they? A. Mr. DeCastro was traffic manager; I was president of the company; Mr. Salazar was corporation manager; Mr. Tomassini was Italian representative in Italy; Mr. Coe was manager of the Rome office; Miss (925) Ana Feria was in Lisbon, and Mr. Rodriguez was in Paris as our agent, and in Madrid we had an agency arrangement with Fletamar.

Q. After July 1951, when you contracted with USOA, who were the administrative personnel of the company? A. When I contracted with US—

Q. Overseas Airlines, who became administrative personnel of the company? A. It was Janis, myself. I have to refresh my recollection. I don't remember right now who was over there.

Q. What did Mr. Janis do? Didn't you just mention Mr. Janis? A. Yes.

Q. What did he do? A. He had a business concern.

Q. What was he doing for AVE at this time? A. He was a member of the Board of Directors.

Q. But were there any Venezuelan administrative personnel after USOA signed the contract in July 1951? I am not talking about directors but administrative personnel. A. You mean accountants and managers?

(926) Q. Yes. A. I would like you to tell me what you mean.

Q. People who actually administered from day to day the business of the company. A. I did administer it.

Q. Were there any others besides yourself? A. Mr. Noguera and Zambelli.

Q. And what were the duties of Mr. Zambelli? A. He was a traffic employee. I mean he was a man who procured traffic for us.

Q. Was that in Caracas? A. Caracas.

Q. Was that as a private agent of yours? A. No, he was an employee.

Q. Of whom? A. Of AVE.

Q. His job was to help procure traffic? A. Yes.

Q. Was he interested in traffic anywhere else or just in Caracas? A. Mostly in Caracas.

Q. He had no interest in the general traffic affairs of the company; is that right? A. USOA general traffic affairs.

(927) Q. Was he interested in the traffic of the company at all stations? A. They have to coordinate wherever they are, they have to be in coordination with all the other stations, otherwise it can't work.

Q. Did he give you any reports on the traffic of the company? A. At what period?

Q. Any time between July 28, 1951 and September 15, 1951. A. I don't remember. I mean, he must have.

Q. Did you know anything about the traffic of the company during July, from July 28, 1951 to September 14, 1951? A. Yes, I did, in Caracas.

Q. How many trips were flown during all this period? A. Two trips.

Q. Did you make any complaints to Mr. Cox or did you direct any of your agents to make any complaints to Mr. Cox about this situation? A. Complaints in what way?

Q. About the traffic. A. Why should I complain about the traffic?

(928) Q. Then I take it you did not make any complaint. A. No, I did not.

Q. You did not direct anybody to make any complaint? A. No, not to my recollection.

Q. Right up to the meeting in New York on September 15th you made no complaint about the traffic? A. No.

Q. Did you make any complaint about anything else up to that time? A. No.

(A short recess.)

By Mr. Schoenwald:

Q. In addition to Mr. Zambelli, what other administrative personnel did CAVE have? A. At Caracas it had—

Q. Not limited to Caracas. During the period July 29, 1951 up to September. A. I think I have named them already.

Q. Zambelli is the one I recall, and Mr. Janis is the other. A. Mr. Janis was a member of the Board of Directors.

Q. How about—

The Court: Mr. Noguera was also.

(929) The Witness: Noguera.

Q. What did Mr. Noguera do? A. He was operations, he helped Mr. Salazar at first, then he stayed as head of operations.

Q. Was he in charge of operations? A. Not after July 29th. Up to the time that Mr. Burger came in and took charge of operations.

Q. Then what was Mr. Noguera's function after Mr. Burger took charge of operations? A. He helped in the office. He was on my payroll.

Q. He was on your personal payroll? A. On my payroll.

Q. Did he render any administrative assistance to CAVE or AVE? A. No, not particularly.

Q. Then the only persons after July 31st other than yourself who rendered administrative assistance to CAVE or AVE, between July 25, 1951 and September 15th, was yourself, Mr. Noguera, Mr. Janis, members of the Board of Directors, who rendered administrative assistance; is that right? A. No, Miss Ana Feria in Lisbon, Mr. Rodriguez in Paris and Mr. Tommassini in Rome.

(930) Q. Miss Ana Feria, was she a Venezuelan citizen? A. She was a Portuguese citizen.

Q. Mr. Rodriguez, was he a Venezuelan citizen? A. He was a Spanish citizen.

Q. And Mr. Tommassini, was he a Venezuelan citizen? A. He was an Italian.

Q. Let's find out how many Venezuelan citizens were rendering administrative assistance to CAVE on behalf of CAVE between July 25, 1951 and September 15, 1951. The only ones I seem to have at this point are yourself, Mr. Zambelli, and Mr. Noguera was formerly engaged in such capacity but then was on your personal payroll and not rendering any administrative assistance, is that right? A. Yes, that's right.

Q. So the only Venezuelans in an administrative capacity were Mr. Zambelli and yourself? A. Yes.

Q. How many Americans were engaged in administrative duties between July 25, 1951 and September 15, 1951? Shall I read you off some names? A. Yes.

(931) Q. Mr. Burger? A. He was, yes.

Q. Mr. Van Bohemen? A. He was.

Q. Would you say Mr. Waters was? A. Yes, he was.

Q. Would you say that Mr. Cox had some role in— A. Who?

Q. Mr. Cox had some role in rendering administrative duties in this connection? A. No.

Q. Mr. Iarossi? A. He was an adjutant, he wasn't then an administrator.

Mr. Schoenwald: I direct your Honor's attention to the franchise—I think it is Section 8—which requires that—

The Court: Don't argue your evidence now. You will have an opportunity to do that at the appropriate time.

Mr. Schoenwald: Thank you.

Q. Did you authorize Mr. Marshall to send the letter of September 17, 1951 to USOA asking for the airplane? A. Yes.

(932) Mr. Nickerson: It is conceded that he did.

Q. Was that because they told you that CAVE wanted to buy these airplanes? A. Yes.

Q. Was that the reason for the letter? A. That was one of the reasons for the letter.

Q. At this conference on September 14th and 15th or 15th, in New York, did Mr. Cox say he would refuse to fly the airplane? A. Yes, definitely.

Q. At the end of that conference hadn't it been left that the lawyers were going to try to work up an agreement based upon the suggestion of Mr. Russell? A. Yes.

Q. So that after Mr. Cox suggested that he didn't like the agreement, then Mr. Russell made a proposal and then Mr. Cox indicated that, "All right, we will let the lawyers

work out an agreement"; is that right? A. They were going to work on an agreement and submit it and see if he liked it, but for the time being he was not going to fly his airplane.

Q. On the very next day, Sunday, September 16th, did you tell Mr. Russell to call up Mr. Cox and tell him you were—that he should notify the War Department, (933) the CAB, the State Department and various other agencies of the U. S. Government? A. Mr. Russell was my attorney.

Q. Did you tell him, however, on Sunday morning to call up—did you call him up and tell him you were going to call the War Department and the CAB and the State Department? A. No, I did not.

Q. Did you approve of that decision on the part of Mr. Russell? A. I did approve it; he was my attorney.

Q. You do acknowledge, do you not, a conversation between yourself and Mr. Webb sometime around the 14th or 15th, in which Mr. Webb called you by telephone, in which you said, "Did you get it?" and you said to Mr. Webb, "Did you get it?" A. I think I said, "Did you get what you were looking for?"

Q. You were referring to the bill of sale, weren't you? A. He said he was going to get some papers he needed.

Q. You knew it was the bill of sale that he was referring to, didn't you? (934) A. Whatever it was, it was something that he was going to get for himself.

Q. Did he tell you he was going down to Wildwood to get a bill of sale? A. He told me that he had half of that plane and he was going to get proof of ownership. I didn't know whether it was his airplane or not.

Q. Did he say he was going to Wildwood to get the bill of sale? A. He told me he was going to get some papers of proof of ownership, that he owned half of that airplane.

Q. And it was the bill of sale to USOA was it not? A. That I don't know. I have heard the bill of sale of USOA.

Q. As a matter of fact, CAVE had made out a bill of sale to USOA hadn't it? A. Yes.

Q. Because there was first a bill of sale from USOA or one of its subsidiaries to CAVE; isn't that right? A. I don't remember the details.

Q. You recall that the airplane was registered in Venezuela, wasn't it? A. Yes.

(935) Q. A bill of sale was made out to CAVE for that purpose? A. Yes.

Q. And that after that there was a bill of sale back to USOA? A. Yes.

Q. This was the paper that was being taken by Mr. Webb, wasn't it? A. I don't know what paper was being taken by Mr. Webb.

Q. When you asked him on the telephone, "Did you get what you were looking for?" this was against the background of his discussion about getting this bill of sale? A. I didn't discuss it with me. He told me. I didn't discuss it with him because I didn't have to discuss it with him.

Q. The thing he was talking about at that time was the bill of sale—

Mr. Nickerson: I object—go ahead.

Q. The thing he was talking about at that time was the bill of sale, wasn't it? A. He was talking about his proof of ownership. Whether a bill of sale or receipt, I don't know what it was.

(936) Q. You knew proof of that ownership was the bill of sale that your company gave USOA?

Mr. Nickerson: I object. He has been over it five or six times.

Mr. Schoenwald: All right.

Q. Between the meeting of the 15th and the phone call by Mr. Russell on the 16th was there any new fact which came to your attention? A. In what sense?

Q. Was there any new fact which caused you to approve or authorize the statements made by Mr. Russell in the phone call, that he was going to call up these various government departments? Was there anything that came to your attention between the 15th and 16th in that connection?

The Court: I am afraid I can't understand your question. I don't see how the witness can. Will you suggest to him what the new fact is. This was a proposal by his lawyer to do certain things, and he said whatever his lawyer did he did with his authority. What is the new fact?

Mr. Schoenwald: As I understand him, I think that there wasn't any new fact that came to the witness's attention.

(937) The Court: You have raised the new fact, and if you say there was no new fact, it seems to me that you are setting up straw men to knock down.

Q. Had you paid USOA any money toward the price of these two airplanes? A. Had I paid? No.

Q. Did you have any terms by which you would purchase two airplanes from USOA on credit? A. No.

Mr. Nickerson: That implies a conclusion, your Honor.

The Court: No. I will allow it.

A. I had an option to buy the airplane.

The Court: Wait for the question, please.

Q. Did you have any credit agreement with USOA to purchase the airplanes? A. No.

Q. On August 15, 1951 you had by this time already arranged for or had actually provided to deliver shares of stock to Mrs. Marshall, didn't you? A. Yes.

Q. You never actually gave the Government of Venezuela a copy of your contract with USOA did you? A. No.

(938) Q. But they asked for it, didn't they? A. I don't recall.

Q. You did get a letter from the Government of Venezuela on the 10th of August 1951 telling you what the difficulties with your letter of July 30, 1951 were, didn't you? Do you know the letter I refer to as the July 30th letter? A. Which one is that?

Q. It is a letter in which you briefly state that you are entering into a contract with USO Airlines.

Mr. Schoenwald: Perhaps you have it.

Mr. Nickerson: Defendant's Exhibit BL.

A. Yes.

Q. You got a letter from the government after that, didn't you? A. That is a letter I haven't seen lately. This is a letter I got that was the answer—

Q. There was a letter? A. Yes, my recollection is there was a letter.

Q. And the letter set forth approximately nine questions, did it not? A. Yes.

Q. And one of the things that they asked you to do in the nine questions was to supply them with a copy (939) of the contract, wasn't it? A. I don't remember. It might be, if you refresh my recollection--

Q. You told them, did you not, in the letter of August 14th, that you couldn't supply them with a copy of the contract with USOA, didn't you? A. Did I tell them that?

Q. That is what I asked you. A. I have to refresh my recollection, and see if I told them that.

Mr. Nickerson: May I see BM for identification?

The Court: Yes. If you know what was actually said in the communication, Mr. Nickerson, I would appreciate your conceding it with a view to saving time.

Mr. Nickerson: It is not in there at all.

The Witness: No, it is not, no.

Q. I refer you—you don't have a copy of it before you. I was directing your attention to the fourth point on page 2.

Mr. Nickerson: It is not in evidence. I tried to get it in evidence and Mr. Schoenwald objected to it. Maybe he will withdraw his objection now.

The Court: Are you willing that this be (940) admitted into evidence, Mr. Schoenwald?

Mr. Schoenwald: I am now prepared to permit this document to go into evidence.

The Court: All right. It will be defendant's Exhibit BM in evidence.

(Received in evidence as Defendant's Exhibit BM.)

Q. It was you who assisted in obtaining all these documents from the government in Venezuela, was it not? A. My brother, who is a lawyer.

Q. And who was it that told him what documents should be obtained? Was it you?

The Court: Who was it that told whom?

Mr. Schoenwald: Told his brother, the lawyer.

Mr. Nickerson: Your Honor—

The Court: Sustained.

Mr. Schoenwald: I would like to find out the circumstances under which the defendant omitted to get document No. 919.

Mr. Nickerson: I will be glad to tell him your Honor. I did not do it. It is my own negligence.

Mr. Schoenwald: I wonder if your Honor could have this document in front of him while I ask the (941) next question, so that you may see its relevance.

Mr. Nickerson: Is it in evidence?

Mr. Schoenwald: It is not.

Mr. Nickerson: May I see it, your Honor?

Mr. Schoenwald: Yes, I have no objection.

Q. Now the man who certified these documents for you on behalf of the Government of Venezuela is Mr. Eduardo Guzman, was it not? A. Yes.

Q. And that same Mr. Guzman— A. One document.

Q. And that same Mr. Guzman used to borrow money from your company, didn't he? A. He is my second cousin.

Q. And the company loaned him money, $3,000, didn't it? A. I loaned him money, my own money, not the company's money.

Q. Ten thousand bolivars is a little more than $3,000, isn't it? A. That is three thousand, around three thousand.

Q. Isn't this a promissory note from Mr. Guzman to CAVE? A. Yes. I charged this to my account.

(942) Mr. Schoenwald: I would like to ask that that document be admitted in evidence.

Mr. Nickerson: I do not think it has any relevance.

The Court: It is conceded to be a promissory note signed by Eduardo Guzman, May 7, 1951, for 10,000 bolivars to AVE.

Is there any point in encumbering the record with this?

Mr. Schoenwald: No.

Q. Now, Colonel, after you authorized the letter of September 17, 1951 to USO Airlines—

Mr. Nickerson: I object to the form of the question. It was not his letter.

The Court: Let us wait until the end of the question.

Q. After the letter of September 17, 1951 to USO Airlines what steps if any did you take to obtain other airplanes? A. I tried to negotiate with Scandinavian Airlines.

Q. Did you make any effort to rent airplanes? A. I asked them to see if they were interested and would like to go into an agreement with me and start (943) operations again.

Q. Did you try to rent airplanes? A. Not to my recollection, no.

Q. Did you have any money to rent airplanes with? A. I don't remember what my cash position was at the time.

Q. Didn't you have part of this money that you had made on the sale of the other airplanes, this $600,000, or did you have part of this $500,000 or $250,000 in accounts receivable to rent airplanes with? A. That was in pesetas.

Q. There was 500,000 in the accounts receivable, 250,000 in pesetas. What about the other 250,000? A. Those were being used to pay expenses of the company, to which I have testified.

Q. Did you have any part of them to use to rent airplanes

with? A. I may have had some money. As a matter of fact, I rented airplanes after—

Q. What kind of airplanes did you rent? A. I rented a C-46.

Q. Is that a four-engine airplane? A. That is a two-engine airplane.

Q. Did you make any effort to rent airplanes (944) that were suitable for use in this international operation? A. Not to my recollection. I don't think I did.

Q. You don't think you tried to rent airplanes? A. No.

Q. Did you publish another brochure? A. No.

Q. Did you engage another agent, or did you ask Mr. Marshall to do anything for you? A. Not to my recollection, no.

Q. As a matter of fact, on August 6, 1951 hadn't you received offers from other people to supply you with airplanes? A. If you refresh my recollection I will say, but I can't remember right now.

Q. Do you remember going to Transocean and asking them to supply you with airplanes? A. No. Transocean sent an offer to us.

Q. After September 15, 1951 did you go to Transocean to look for airplanes? A. After?

Q. After September 15th, 16th or 17th, 1951 did you go to Transocean to try to get airplanes? A. I don't remember. Mr. Marshall may have gone. (945) I don't know. He was my attorney in fact.

Q. Did you make any personal efforts to get airplanes? A. I don't remember.

Q. You don't remember making any efforts to get airplanes after September 1951? A. I don't remember.

Q. How do you account for the statement on page 6 of the prospectus that there wa approximately a $60,000 loss in 1951, after you had just made a profit on the airplanes of $500,000?

Mr. Nickerson: Your Honor, hasn't he already explained that?

The Court: Yes. I sustain the objection on the ground that it is repetitious, cumulative and argumentative.

Q. Can you tell us whether or not the company was operating at a profit during 1950? A. During 1950?

Q. During 1950. A. Yes, it was.

Q. Now that 256,000 of pesetas—

The Court: 261,830.

Mr. Schoenwald: Thank you.

(946) Q. The 261,830 of pesetas was largely earned during 1950? A. It wasn't what?

Q. The 261,000 of pesetas referred to in the prospectus, I think on page 2, as a quarter of a million dollars in pesetas, and referred to on page 6 as $261,000, that was largely earned in 1950, wasn't it? A. Part of it was earned in 1950 and part in 1951.

Q. A substantial part was earned in 1950, was it not? A. Part was earned in 1950 and part in 1951. We met expenses from out of those pesetas we were spending in Spain. We had the right to spend them in Spain.

Q. When you made your income tax statement in 1951 you showed approximately, just before you sold the airplanes in April 1951—

Mr. Nickerson: It is the tax statement for 1950.

Mr. Schoenwald: Yes, but it was made at the end of April 1951. Just before he sold the airplanes.

Q. When you made this tax return you had then about a quarter of a million dollars in pesetas in (947) Spain, didn't you? A. It doesn't show on the tax return.

Q. Well, you didn't take any reserve during 1950, did you, on this quarter of a million dollars in pesetas? A. No.

Q. And the 58,000 operating profit and the net profit of 19,000 was calculated before you took the reverse, wasn't it? A. Yes.

Q. And so, when you took the reserve in 1951 for the first time, had you taken that reserve in 1950 it would have reduced your profit for 1950 to a loss of about $125,000, wouldn't it? A. If I had taken it, yes.

Q. You knew in June 1951, when you issued the prospectus, that the figure was a loss for 1950 of $125,000, didn't you?

Mr. Nickerson: I don't mean to interrupt this line of questioning but it shows right here on the statement what it was. And the prospectus itself shows that as a part of that a substantial part was earned in 1950. I am going to object to these questions as (948) irrelevant.

The Court: Sustained.

By the Court:

Q. Could you tell me this: You considered that your business was a going business in June, July and August 1951, didn't you? A. It was a going business; it was not operating at the time.

Q. It was not conducting a schedule operation, but you considered it to be a going business? A. We had our five offices open.

Q. You considered your office in Caracas to be open? A. In Caracas open, and Rome, Lisbon, Madrid.

Q. Why did you cease keeping books after April 30, 1951? A. We did not cease keeping books, but the returns of vouchers and so forth was very, very slow.

Q. No, but the flat statement was made by your lawyer this morning that AVE books were not kept after April 30, 1951.

Mr. Nickerson: Yes, that is right, your Honor, on the journal and ledger they were not.

Q. Why was that? (949) A. Because they had to wait for all the receipts, all the expenses, everything to come from all the stations in Europe, and that would take some time.

Q. That is not a reason for not keeping books, is it? A. On the ledger you can't put it.

Q. Did you resume keeping them when the returns came in? A. When the returns came in we didn't have an office at that time. When everything was in AVE had just suspended operation and I had to close the offices.

Q. When did that occur? A. That occurred around September.

Q. So that as I understand you, after April 1951 the reason why the books were not kept is because any entries would depend upon transactions in Europe which were not reported? A. Not reported or—

Q. Promptly. A. Yes.

Q. And when they were reported your office was closed? A. Yes.

(950) By Mr. Schoenwald:

Q. You opened the office again, didn't you, in August and September 1951? Isn't that right? A. It was open all the time in August.

Q. In August and September 1951? A. Yes.

Q. Did you bring it up to date during August and September of 1951? A. Apparently Morgan did not have time to go on that.

Q. They were not brought up to date? A. No, they were not.

Q. During 1950 you knew that pesetas that you kept on your books were not worth what you had them on your books for; isn't that right? A. I had them at the exchange rate existing at that time in Spain.

Q. You knew that that was not what they were worth in dollars? A. I don't know what the Government of Spain put as the price on the pesetas.

Q. As a matter of fact, had you not raised your fares in Spain because you received notice that the pesetas were devalued during 1950?

(951) The Witness: May I have that question?

The Court: Why is this of any relevance as to what he did?

* * *

(953) By Mr. Schoenwald:

Q. Did you receive that document? A. Yes, I did.

Mr. Schoenwald: I would like to ask that this be admitted in evidence.

The Court: Any objection?

Mr. Nickerson: I will reserve a motion to strike.

The Court: All right.

(954) (Plaintiff's Exhibit 353 received in evidence.)

Q. You were being pressed, were you not, during early 1951 for payment of mortgages on your airplanes, weren't you? A. Yes.

Q. As a matter of fact, when you bought these airplanes from the Flying Tigers and Near East, referred to in the

prospectus, you didn't purchase them out of income, did you, you purchased them by borrowing money from the bank; isn't that right? A. Yes.

Q. Is it not correct that the total taxes on this return were about 500 bolivars? A. I don't know. Whatever it was, we paid it.

Q. The total profit you showed was $19,000 approximately; isn't that right? For 1950. A. That is it.

Q. And you know that on a profit of $19,000 in Venezuela the taxes are about 500 bolivars, isn't that right? About $500. A. I am not aware of the figures.

Q. That doesn't sound far from correct, does it? A. It sounds approximately that, yes.

(955) Q. At the time you paid this tax of $500, were you not under pressure from official government banks to pay off a loan to them on the airplanes of the half million dollars on which you were in default? A. Official banks?

Q. Did you owe any money to any banks in Venezuela on the airplanes? A. Yes, I owed money to the banks.

Q. Were these government banks? A. No.

Q. They are private banks? A. They are private banks.

Q. At the time you prepared this return were you not under some pressure because they demanded to have you pay that $500? A. Yes, I had to pay it.

Q. As a matter of fact, at the time you made out this return you knew you were going to have to make representations to American operators to get new airplanes? A. To get?

Q. To secure new airplanes to fly. You had already arranged by April to sell your airplanes, hadn't you. (956) A. Yes.

Q. So when you prepared this you knew you were going to need new airplanes?

Mr. Nickerson: Prepared what?

Mr. Schoenwald: Prepared the tax return, Plaintiff's Exhibit 42-A.

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(957) The Court: Don't argue it. He said that he was being pressed to pay off the airplane loans.

Mr. Schoenwald: The next question I asked was that he knew at the time that the airplanes were to be sold in a few days.

The Witness: Yes.

Q. Then U. S. Airlines had offered to buy your airplane for $600,000 that you have told us about?

Mr. Wooten was the president of that airline, wasn't he?

A. To my understanding, yes.

Q. And is Mr. Wooten—had he about a year before sold you an airplane for about $220,000; isn't that right?

A. $210,000.

Q. And he is the same Mr. Wooten who was the president of Near East, who sued you in July—in June?

A. Yes.

The Court: Of what year?

Mr. Schoenwald: 1951.

Q. I think that I have made an error in a question the other day when I suggested that the suit was in the amount of $60,000. The suit was for $100,000, wasn't (958) it, approximately? A. It is in the papers. I don't know how much it was.

Mr. Schoenwald: Did you have a letter or a paper from Mr. Wooten or from U. S. Airlines indicating what their assets were at that time?

Mr. Nickerson: We concede we didn't.

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(963) By Mr. Schoenwald:

Q. When you bought this ticket to go to Rome, you came to New York first, didn't you? A. Yes.

Q. By this time you had received a cable from Mr. Cox expressing his anxiety of getting in touch with you, hadn't you? A. No. He asked me to go to Rome.

Q. Asking you to go to Rome. You stayed here in New York at least 24 hours, didn't you? A. I stayed overnight I think it was, yes.

Q. At least 24 hours. A. I didn't say at least 24 hours. I said overnight.

Q. Did you get in touch with Mr. Cox? A. Mr. Cox was supposed to be in Rome at that time, according to his telegram.

Q. Did you make an effort to contact his office? A. I stayed overnight. I don't think I did, no.

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(964) AFTERNOON SESSION

Mr. Nickerson: May I call Mr. Zinman, your Honor?

The Court: Yes.

LOUIS ZINMAN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

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(972) Cross Examination by Mr. Schoenwald:

Q. Have you seen the tax return of the company? (973) A. I have seen it; I didn't examine it.

Q. You understand that to be the tax return of CAVE, which includes the National and International Division, both? A. Sir?

Q. Did you understand that to be the tax return of CAVE which includes both the National and International Division?

Mr. Schoenwald: Do you have the tax return?

Mr. Nickerson: Yes.

Q. Did you get the question? A. I got the question, but I don't know if I can answer it. But I would say this, that the figure of profit of 66,000 bolivars agrees with the books.

Q. But do you know whether this tax return, by looking at it, Plaintiff's Exhibit 42-A, is a tax return of the National Division and the International Division combined under the heading of CAVE? A. I don't know how to answer that question either. I will say it is the tax return of CAVE.

Q. Can you look at it and see if this includes the activities of the National Division?

Mr. Schoenwald: Or perhaps counsel can (974) stipulate.

Mr. Nickerson: Where is it? Point it out to me.

Mr. Schoenwald: It is in the Colonel's testimony. The Colonel testified in the deposition.

Mr. Nickerson: He is the one that looked at the books. Point out something to him and maybe he can testify to it.

Q. Is CAVE the parent company which includes the National and International Division? A. I don't know what the—

Mr. Nickerson: He has conceded that it includes the International Division.

The Court: CAVE is the parent company.

Mr. Nickerson: There is no subsidiary. AVE is a division only.

Q. This covers both activities, is that right? A. I presume so. I would rather answer the question that this figure agrees with what the books show that I saw.

Q. Now if within this tax return of CAVE there was some $70,000 of vouchers for domestic operations, would you say then that the— A. $70,000?

(975) Q. Dollars, that is right, approximately 150,000 bolivars, in the neighborhood of three times that would be bolivars. Would you say then that this is an accurate reflection of the activities of the International Division? A. Will you say that again, please.

Q. You testified that the gross income for 1950 corresponds to the gross income in the prospectus, is that right? A. I said the gross income in the books corresponds with the income in the prospectus. If you want me to show—

Q. Will you see if the gross income here corresponds with that gross income figure?

Mr. Nickerson: I think it does, your Honor, almost the same.

The Court: But he is asking the witness.

Mr. Nickerson: I am just trying to concede it.

The Court: Then concede it.

Mr. Schoenwald: Would you?

Mr. Nickerson: Yes. It is almost the same, your Honor.

(976) Mr. Schoenwald: And you concede that that includes the activities of the National Division, if any?

Mr. Nickerson: Well, I think the witness should explain the National Division. I am not an accountant.

A. This is not the same as the figure that I have.

Q. For gross income during 1950? A. I have five million, seven hundred and forty—wait a minute, I am sorry. Yes, it is the same.

Q. And you know, don't you, that there was a local operation, isn't that right? A. Yes, I know there was a local operation.

Q. And that the local operation activities must be included, if any, in this return, since this is the only return for the company, isn't that right? A. Presumably.

Q. Now were you shown these invoices for 1950, local operation of the company (handing)? A. No.

Q. Will you look at them now. A. I can't read Spanish, so I wouldn't know what these are, without an interpreter.

(977) Mr. Schoenwald: Perhaps the Colonel and Mr. Talero, who have already been sworn as interpreters, can tell you what those invoices consist of.

The Court: Are these invoices which were used by the witness before which you are now showing him for the first time?

Mr. Schoenwald: This witness hasn't seen them before, to my knowledge. I don't know.

The Court: I don't want to wait while he conducts an accounting exploration.

Mr. Schoenwald: Mr. Nickerson, would you stipulate—the Colonel has been asked this on his deposition. Maybe we can look at that and probably tell us that they represent activities of the National Division for 70,000.

Mr. Nickerson: May I make a suggestion? I think it will be helpful. That is, that we ask the witness to explain whether the National Division appears on the books and what appears thereon with respect to it.

Mr. Schoenwald: I think I may be able to conduct—

The Court: Perhaps it might shorten it if he tells you that first and perhaps you can ask (978) the question which you want to ask without leading us into these other papers that the witness has no familiarity with. I am concerned about the digression.

Can you answer the question as to whether or not you have looked at the international aspect of this buinsess?

Mr. Nickerson: National.

The Witness: Yes, I think, your Honor, there is an account on the books for the National Division which was carried as an asset which wasn't used as a deduction in arriving at net income.

The Court: Under what heading is that?

The Witness: National Division. And it wasn't dollars. It was approximately about 79,000 bolivars, not dollars. You can see the account on the books.

Q. These are vouchers. This is not the account. I wonder if you can look at this and tell us if it doesn't come to approximately $69,000, not bolivars? A. I can't do that in two minutes.

Q. Perhaps the Colonel could have a chance to do that with you and then you could resume the stand on this particular problem.

(979) The Court: If you will represent that you have added them and that they come out in such a fashion, I will accept your representation as a basis for further questions of this witness.

Mr. Schoenwald: Mr. Talero has done this particular job. Is that 69?

Mr. Talero: About 69,000.

Mr. Schoenwald: I will represent that Mr. Talero, who is my Spanish translator, has made a computation here of invoices all dated in the year 1950 on the letterhead of CAVE, the defendant in this case, for services of a domestic nature which total in bolivars 231,665.29, which was the equivalent at that time of $69,153.82. And the list of these items is attached.

And I would like to suggest to your Honor that there are three items which are improper which total—that is, improper in the sense that they are not flight operations but actually they represent sale of equipment which total about $1500, one for the sale of scales, one for the sale of paint, and one for the sale of an apartment at the airport. So that properly subtracted from that $69,153.82 should be $1500.

(980) Mr. Nickerson: Your Honor, may we examine them and maybe we can concede it.

The Court: All right.

Q. Assume for the moment that that is correct, that there were that many invoices during 1950 for the transportation within Venezuela other than international transportation, would you then say that the statement contained in the prospectus as to what the gross income of this company was in 1950 is inaccurate? A. If these items were included in that total of 1,700,000—

Q. If they conducted 70,000 or 69,000 dollars worth of business in that year and if this is the tax return of CAVE, can you think of any reason why it wasn't include in that total? A. You are asking me a question which I can't answer. Unless I see that they were actually put on the books and were included in that total I wouldn't try to answer that question.

Q. You don't know whether they were put in the books? A. I don't know whether they were put in the book, or weren't put in the books.

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(993) ALEJO DE CERVERA, recalled as a witness, having been previously sworn, testified further as follows:

Direct Examination by Mr. Schoenwald:

Q. Mr. De Cervera, have you examined the Constitution of Venezuela that was in force in 1951 dealing with the assignability to foreign corporations of contracts affected with the public interest? A. Yes.

(994) Q. What have you found? A. I have here the Constitution of 1947 in effect in 1950 and 1951.

Q. How do you know it was in effect in 1950 and 1951? A. Because I have here the Constitution of 1953 and the last section does state that the Constitution of July 5, 1947 is repealed. So in 1950 and 1951 the Constitution of 1947 was in effect.

Q. Can you tell us what the Constitution says on the subject? A. The Constitution of 1947 has an article, Article 107, which provides almost exactly with Article 49 of the Constitution of 1936, providing, Article 107 says:

> "No contract involving the national, state or municipal public welfare [interest] shall be made with for-

eign governments nor may such a contract be transferred in whole or in part to any foreign government, nor shall any contract be made with companies which are not domiciled in Venezuela, nor may there be transferred to such companies any contracts made with third parties."

(995) Q. Now can you tell us whether or not the contract between USOA and AVE was a contract coming within that provision of the Constitution of Venezuela? A. Certainly.

Q. What is the basis of that opinion? A. The second section or the second part of this Article 107:

"Nor shall any contracts be made with companies which are not domiciled in Venezuela"—

that is to say, United States Overseas Airlines—

"nor may there be transferred to such companies"—

to the American company in our case—

"any contract made with a third party"—

that is to say with CAVE.

Q. Is the franchise, the contract between the government and CAVE one of the kinds of contract that comes within the purview of this section of the law? A. Yes.

Q. What makes you say that? A. Article 107 says:

"No contract involving the public welfare"—

for a common law mentality it is strange to be asked to demonstrate that the contract involving a (996) transference is a contract of foreign interest, of public interest, because it is very much taken for granted in our system.

There is a continuous administrative practice; there are plenty of books insisting in the public interest in this kind of contract, and there is even a constitutional provision saying that such contracts are of national interest.

This Article 138, Section 22, [23] this article says:

"The following powers belong to the national power."

That is the administration of the public interest, since the jurisdiction upon these matters belongs to the national power.

Sub-section 22 [23]:

"All matters relating to land, maritime, aerial, river and lake transportation."

Q. Have you got any other statutes or local laws which shows the relationship of the public interest in contracts involving air carriage? Do you have anything else with you dealing with that? A. Yes. I think there is also an article in the Law of Civil Aviation. Article 10, the present law will regulate all reference to civil (997) aviation without prejudice of those with preference stipulated in treaties and international conventions celebrated by the republic.

We could even see that all these matters belong to what we call the Derecho Administrativo, and the Derecho Administrativo is the juridical discipline which embraces all the matters considered as pertaining to the public interest.

Q. Now I show you Defendant's Exhibits BM and BL which purports to be letters sent to the Government of Venezuela, to the Ministry of Communications of Venezuela by the defendant. And I ask you to assume that the defendants presented in evidence a document purporting to show a renewal of this franchise for 1951, and I also

ask you to look at Defendant's Exhibit N in evidence, the contract between USO Airlines and CAVE, and please tell us what the effect of these two letters to the Ministry of Communications has upon the validity of the franchise or the validity of the contract between USOA and AVE. A. As I understand this, I have now in my hand a letter signed by Jorge Marcano to the Director of Civil Aeronautics. In this letter (998) there are several positions as to some modifications apparently undergone by CAVE. Evidently this letter intends to obtain a renewal of air franchise already granted to CAVE. And since there have been some modifications in CAVE the letter explains to the Director of Civil Aeronautics what these modifications have been in order to obtain the renewal of the franchise.

As to this, it is my opinion that a comparison between this letter and the contents of the contract between CAVE and United States Overseas Airlines, this comparison, as I say, shows very distinctly that the details contained in the letter are not very accurate in themselves and they are very few, because in this contract have happened many things which are not reflected at all in the letter.

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(999) The Court: Well, he may state what the inaccuracies are that he is referring to.

A. I am especially referring, myself, to the point in the letter in which it said that the only risk which CAVE will have will be with respect to aircraft which they will acquire on credit from the North American Company. That is to say, this letter is suggesting that CAVE has the ownership or is to be the owner in the future of the aircraft which they will acquire on credit. And it is my understanding that according to this document that that is not exactly the case. But it may be that is a conclusion which does not belong to me.

Q. Are there any other facts which you can give or opinions which you can give us as to whether or not—

Mr. Nickerson: May we have on the record which letter he is referring to now?

The Court: Yes.

Mr. Schoenwald: BM.

Q. Can you tell us with respect to both BM and BL whether or not there are any other items which (1000) are either reported inaccurately in those letters or which do not completely report the contents of Defendant's Exhibit N, in so far as it relates to the terms of the franchise issued by the Venezuelan Government? A. Well, a complete answer to this question would require me to go again through the franchise and see which are the modifications included in the franchise, to see whether or not they are in the letter.

Mr. Schoenwald: To save the Court's time, may we include that in his opinion, which he indicated previously he would submit on the related question?

The Court: You mean a word by word comparison?

Mr. Schoenwald: Yes.

The Witness: Clause by clause.

The Court: Clause by clause, yes. All right.

Mr. Schoenwald: Then we won't have to pursue this point any further.

Q. Now assume that a franchise had been granted or a renewal had been granted by the government based upon such letters as these (indicating), in view of the law of Venezuela would such renewal of a franchise (1001) be valid? A. Well, in my opinion if a renewal of the fran-

chise is obtained, with basis in these two documents, it would be a renewal on fraud because the situation is not—clearly is not wholly indicated in these documents. That is to say, if there is such a renewal, the federal government of Venezuela has granted the renewal without knowing exactly the situation which it has been considered to do.

Q. Would the franchise then be valid, a renewal then be valid? A. No. Impossible.

Q. Would the renewal of the franchise by the Venezuelan Ministry of Communications, whether by fraud—would the renewal of the franchise by the Venezuelan Ministry of Communications overcome the constitutional section that you previously referred to? A. Impossible to. That is against the law, against the Constitution; and the government is bound to abide by the law. There are provisions in the Constitution in case the government does not abide by the Constitution and by the laws.

Q. What happens if the government does not (1002) abide by the Constitution? A. It happens that, first, the President has to take care of the question. The public attorney of Venezuela, too. And anybody can claim, and the Government has to attend this petition. And it is indicated that this is one of the questions of the jurisdiction of the Sala Federal y de Casacion.

* * *

Cross Examination by Mr. Nickerson:

Q. With respect to the Constitution, sir, do I understand correctly that that prohibits the government from entering into certain contracts with someone other than a Venezuelan or a Venezuelan corporation? Is that correct? A. Yes, sir.

Q. And it also prohibits the transfer of such contracts—A. If made—

Q. —under certain circumstances if they are transferred to a non-Venezuelan company, is that correct? A. Yes.

(1003) Q. You had studied Venezuelan law for this case, as I understood you to testify. A. And before, too.

Q. And have you practiced in Venezuela at all? A. Not exactly, but it so happens that I have family in Venezuela—

Q. No. I mean have you given advice with respect to Venezuelan law? A. Yes, sir, my family.

Q. Heretofore you have practiced? A. Yes.

Q. You have been paid for your services? A. Not exactly, because it was my family.

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(1014) Mr. Schoenwald: I don't want to frustrate Mr. Nickerson but I advised that we endeavored to get some papers from the Civil Aeronautics Board and they have just been delivered to me, and I think I would like to have them marked in evidence now.

I think the papers will show that on September (1015) 30, 1951 this company was bankrupt, had practically no cash, and the period immediately before it and the period immediately after it they didn't have enough cash to buy one airplane.

Mr. Nickerson: I reserve a motion to strike.

The Court: Yes. Mark it.

(Plaintiff's Exhibit 398 received in evidence.)

Mr. Schoenwald: One item might require some understanding on which we perhaps can avoid some testimony.

The negative balances, I believe, are shown ordinarily in parentheses, and the only point is, the person who prepared the return showed the nega-

tive balance by an asterisk, and if there is any confusion about what the asterisk refers to, perhaps Mr. Nickerson and I can clear it up. I think it is apparent from reading the whole document, but if you want to check it we can clear it.

• • •

By Mr. Nickerson:

(1021) Page 29, second question (Webb's deposition):

"Q. Prior to the time that you compiled Defendant's Exhibit 120"—

(1022) Your Honor, that refers to a statement which Webb prepared, and perhaps it will be conceded, at the request of USOA with respect to this litigation.

Mr. Schoenwald: Are you asking me to concede something?

Mr. Nickerson: Yes.

Mr. Schoenwald: We are going to concede that there is a statement and we would like very much to have it in evidence. If you want to offer it in evidence—

Mr. Nickerson: No, I am not offering the statement. I am just explaining what the reference is.

Mr. Schoenwald: Without the reference in I am going to object to reading this part of the deposition into the record.

Mr. Nickerson: May I read the question so that your Honor may rule on it?

The Court: Yes.

Mr. Nickerson (Reading):

"Q. Prior to the time that you compiled Defendant's Exhibit 120, did you talk with Mr. Cox about compiling the statement?"

The Court: You are objecting on what ground?

Mr. Schoenwald: This is all with reference to a document not in evidence. I do not think it is possible (1023) for your Honor to understand the purport of the question and answer without knowing what paper they are talking about. I am asking counsel to put the paper in evidence and he won't do it. I don't see how you can possibly understand the nature of the question.

The Court: His conversation with Mr. Cox may be relevant and it may show something totally apart from the paper.

Mr. Schoenwald: I don't see how your Honor can fairly understand it or how it can be relevant without the knowledge of what paper it is that they are talking about.

The Court: That may be and it may not be. I will have to hear the testimony first. I will give you the right to move to strike out.

* * *

(1029) Now, your Honor, I am going to read from the deposition of Mr. Cox, the first question on page 59. Do you have it?

Mr. Schoenwald: Wait just a moment.

The Court: How much will you be reading?

Mr. Nickerson: I have just two or three questions, and I am going to introduce one exhibit, and that is my case.

The Court: All right.

Mr. Nickerson: Page 59. Will you look over my shoulder.

"Q. You do not recall whether he mentioned lack of capital?"

May it be conceded that this is the meeting with Mr. Marshall prior to entering into the contract?

Mr. Schoenwald: Yes.

Mr. Nickerson (Reading):

"A. On AVE's part?

"Q. Yes. A. I don't think he mentioned lack of capital, because he told me that Marcano had just sold two airplanes (1030) for one million dollars and Marcano, in his own right, was a very wealthy man.

"Q. He did not mention lack of capital as a reason for difficulties with the operation before? A. I don't recall that he did. He may have mentioned it but he seemed to stress the fact that there was so much interference by people who just did not know the aviation business, and, of course, everyone knows that that can foul an operation up as fast as anything.

"Q. Did he mention who these former partners or investors were? A. He mentioned that one of the airplanes had formerly belonged to the Flying Tiger line and one to Near East Air Transport, I believe it was, but that Marcano had bought these planes out from those two companies and then subsequently decided to sell them. I am pretty certain he said he sold them for a half million dollars apiece and he had bought them for $250,000 or $270,000 or $280,000. I don't know the exact figure he said he purchased them for.

"Mr. Halpert: Apiece?

"The Witness: Yes."

* * *

(1033) (Defendant's Exhibit CD received in evidence.)

Mr. Nickerson: Defendants rest, your Honor.

* * *

(1034) Mr. Schoenwald: I also would like to advise your Honor that Mr. Webb, whose deposition was read from a few moments ago, is the same Mr. Webb identified by Mr. D. C. Cox as the man who had ultimately taken the airplane to Texas, which was the subject of litigation at the time.

The Court: I remember the other testimony.

Mr. Schoenwald: I would like also to read from Mr. Webb's deposition. Page 25; and it is conceded that he is speaking of what Mr. Burger said on page 25?

(1035) Mr. Nickerson: What is the question?

Mr. Schoenwald (Reading):

"Q. On page 4 of Defendants' Exhibit 120, beginning in the third full paragraph, it states:"—and this is Mr. Webb speaking of Mr. Burger—" 'Captain Burger also told me that regardless of what happened, AVE was going to fly: without or with Ralph Cox.' "

Mr. Nickerson: I object to what Burger and Webb said to each other, your Honor, because these two, they are both employees of USOA.

Mr. Schoenwald: Mr. Webb was not an employee of USOA at the time this deposition was taken. He is the man who ultimately took the airplane; and this is part of the same conversation from which my adversary read about the same exhibit, 120.

The Court: Yes, but how can Captain Burger bind the defendants? Burger, whom he is quoting, is an employee of your client. Here you have one employee quoting another employee against an adverse party. They are both employees of your client who are suing the adverse party.

Mr. Nickerson: It is a quotation from a statement that was made to prepare for this case.

(1036) The Court: "Captain Burger told me (Webb) what Ave was going to do." That is not competent testimony.

Mr. Schoenwald: If your Honor please, there have been a number of inconsistent statements by Mr. Webb.

The Court: But you are not arguing the evidence now.

Mr. Schoenwald: No, but I would like to read this to show the inconsistencies in Mr. Webb's statements with his own statements. In other words. I am going to suggest to your Honor that I will read into the record statements by Mr. Webb that it was Mr. Burger's idea that the plane be taken, that it was his idea and that it was Mr. Cox's idea.

The Court: That the plane be taken?

Mr. Schoenwald: That the bill of sale be taken.

The Court: Well, why are you gentlemen so interested in exploring that?

Mr. Nickerson: I certainly am not.

Mr. Schoenwald: Mr. Webb's deposition has been read in by the defendants, and I would like to show something which reflects on the credibility of Mr. Webb.

The Court: I will sustain the objection to the (1037) last statement on the ground that that doesn't show anything except incompetent testimony and I don't see how it could possibly affect his credibility. So read the next question that you think can be asked.

Mr. Schoenwald: These conversations were all with Mr. Burger. The conversations I had marked were all between Mr. Burger and Mr. Webb.

The Court: I take it you press your objection on the ground that they are incompetent and not binding.

Mr. Nickerson: Certainly, your Honor.

The Court: I don't see how I can escape the saving objection.

Mr. Schoenwald: I will read to your Honor from page 76 of the Burger deposition.

"Q. When was your next flight booked out of Rome? A. We delayed several flights because the load would fall apart. It would drop from a full load to seven or eight passengers that were ready to go.

"Q. Then you would cancel the flight? A. We would cancel the flight, yes.

"Q. Excuse me. Go ahead A. That was a situation that I didn't openly discuss with Colonel Marcano when he first came to Rome. I invited a Mr. Rickson to come from Geneva, Switzerland, and Mr. (1038) Rickson and I had several meetings and conferences while Colonel Marcano was in Rome.

"Mr. Rickson had worked previously with Commandante Botto and they generated the first flights to Venezuela using Transocean equipment several years prior to AVE's operation."

I don't think you want that part of the confidence that Mr. Rickson had in Botto.

Mr. Nickerson: No.

Mr. Schoenwald: Page 89:

"Q. Yes, Defendants' Exhibit 127. A. This Mr. Castellano was one of the biggest agents. He had been to the old AVE and he was one of the principal ones that we were having dealings with, which I didn't find out almost until the very last that he was the principal one.

"The full story on all of these agents and all of the details was very slowly unfolding to us, and along the lines of commissions, Mr. Castellano, at the last minute, stood me up for thirteen passengers."

Can we understand that these conversations are in Rome after August 20th, after Colonel Marcano got there?

Mr. Nickerson: I am going to move to strike the conversations with Castellano.

(1039) The Court: Yes. Motion granted.

Mr. Nickerson: If it was after—I don't know whether it was or not, your Honor.

Mr. Schoenwald: Well, the Colonel got there after August 20th; isn't that right?

Mr. Nickerson: I object to conversations with an outsider, your Honor.

Mr. Schoenwald: This is not the conversation. It is a report on what happened. There is some indication that this conversation with Mr. Castellano—

The Court: The souree of the information is Mr. Castellano, is it not?

Mr. Schoenwald: No. As a matter of fact, we had the previous deposition, a section of it down there, of Mr. Burger, that he couldn't speak Italian, that this information all came from Mr. Botto and Mr. Cover and Mr. Tommassini.

The Court: I have already sustained objections to those on the ground that they were independent contractors, not employed by the defendant.

Mr. Schoenwald: Well, Tommassini, I think we have understood, was on the payroll of the Colonel.

The Court: Yes, but you didn't mention Tommassini. You mentioned Cover.

(1040) Mr. Schoenwald: Reading from the top of page 90, he tells of his experiences. There is no conversation reported here.

"A. In order to get the thirteen passengers I had to pay him more than the recognized commission, in order to get them at the last minute prior to departure from Rome on September 9th.

"Q. When you say 'recognized commission,' by what criteria do you mean? A. That we were paying a large commission as it were anyhow.

"Q. Was there a schedule of commissions published? A. There was no published schedule of commissions for this immigration, no. It added up to something like 20 percent or 22 percent total that was paid in commissions, but it wasn't all paid to one agent. A subagent got something, a general agent got something, and it worked that way."

Going over to page 91:

"Q. You didn't say that you would not pay more than 'X' commission? A. No. In fact, this guy got 35 percent before I got the last passengers out of him.

"Q. What flight was that? A. September 9th from Rome.

(1041) "Q. How many passengers did you have on that flight back? A. I would have to refer to the manifest.

"Q. Would you? A. Yes, sir. It says here 26 passengers, but I believe there were a few more than that, that we picked up some in Madrid.

"Q. Did USOA have a traffic representative in Rome? A. Yes.

"Q. Who was that? A. Harold P. Van Bohemen.

"Q. What was his job? A. General traffic agent for AVE.

"Q. What was he supposed to do as general traffic agent? A. He was supposed to develop traffic, inter-line agreements, supervise all agency operations and so forth."

Deposition of Mr. Webb.

Pages 229, 230 and 231:

"Q. When did the first flight leave? A. September 9th.

"Q. Do you know how many passengers there were on that flight—and I show you, to refresh your recollection—the manifest for that flight, Defendants' Exhibit 32. A. We had aboard 26 revenue passengers.

(1042) Q. What occurred, if you know, between August 25th and August 27th and between August 27th and September 9th that the flight was only able to obtain 26 paying passengers when the booking list on the first date had been 24 as reported to you, and the booking list on the second day had been thirty, as reported to you? A. Mr. Halpert, I have never been able to understand that satisfactorily myself. I can tell you what my opinion is and what I was told.

"Q. Tell me not your opinion but tell me what you were told and who told you."

Mr. Nickerson: May I object to what he was told, your Honor, and I will move to strike out the previous answer.

The Court: I grant the motion. There is nothing there of any importance or of any probative value.

Mr. Schoenwald: All right. Plaintiff rests.

The Court: Both sides rest.

Mr. Nickerson: Your Honor, I can concede with respect to these documents which we were shown which Mr. Zinman had been studying, either that they relate to national operations or that they appear on the books. In fact, we know they do not appear on the books.

The Court: Very well.

(1043) Mr. Nickerson: I am sorry. That was not credited to the operational accounts.

* * *

(1044). The Court: Now, gentlemen, I would appreciate it if you would attend at ten o'clock Wednesday for the purpose of summing up. I will allow each one of you not more than an hour for the purpose of summing up the case and making any legal motions that you wish to make.

I have arrived at certain tentative conclusions and I think I should give expression to them now so that you might be assisted in preparing for your summing up and your motions on Wednesday. At that time, if I do not come to a final conclusion in the case, I will request you to prepare findings of fact and conclusions of law and to exchange them, and then, after a reasonably short time, to file any exceptions to those findings and conclusions. That is, I always of course assume that you will never agree with each other with respect to any findings and conclusions, but there are certain ones that contain what you might consider to be glaring errors of fact or law which you believe on their face require correction, and that is what I mean by saying that you will be given a reasonable time to file exceptions. (1045) But you should in the first instance exchange findings and conclusions and then file any exceptions. In each instance your findings should be related to the testimony of some witness or to any exhibits in the case so that I will know what the basis for it is, and your conclusions of law should be substantiated by some appropriate legal citation.

Now my tentative conclusions are these:

I do not believe that there is any factual substantiation for the plaintiff's claim of fraud and deceit. I do not think that there was any fraud or deceit perpetrated upon the plaintiffs by the defendants in this case, or that the defendants owed the plaintiffs any fiduciary duty, or that such duty was violated, and I intend to entertain defendants' motions to dismiss allegations by the plaintiffs to this effect, and to eliminate from the case any claim by the plaintiffs for exemplary damages.

I also believe that there is no factual basis for the defendants' claim that the option provisions of the agreement, Defendant's Exhibit N, to purchase two aircraft were violated by the plaintiff. There is credible proof which convinces me that this option provision was intended and was understood by the parties (1046) to be exercisable by the defendants within the contractual period of the agreement for the purpose of acquiring aircraft solely, and I underscore "solely" for continuing its schedule franchise operation. The uncontroverted proof is that the defendants purported to exercise this option in order to effect a profitable paper speculation. I think there is credible proof to the effect that neither the defendants nor their purported purchasers were financially able to enter into this transaction. The defendants were unable to buy it, nor were the purchasers from them able to purchase it.

But be that as it may, and I do not believe I need urge that question of fact, I think it is clear that what happened here was that the defendants sought to take advantage of the favorable market conditions effected by the Korean War and the increase in the airline business, by making an immediate resale through means of a paper transaction and thereby obtaining a substantial profit. This was not what the option provision was intended to permit nor accomplish. I have already stated that I believe what its purpose was, and I will therefore entertain a motion for dismissal by the plaintiffs for that portion of the case which relates to (1047) the alleged violation of the option provisions of the agreement.

Now I believe that what we have here is a breach of contract case, and essentially the question is. Was the agreement of July 1951 breached and, if so, by whom? What are the legal damages, if any, that can be assessed as a result thereof?

I have no doubt that the parties here were engaged in a commercial transaction at arm's length. And the issues

in this case must, in my opinion, be decided within that factual framework.

• • •

(1048) Mr. Nickerson: May it please the Court, I move now to dismiss the complaint for failure to prove a claim, and I move for a judgment upon the counterclaim in the amount which I will hereafter mention.

I also move with respect to all matters (1049) on which I reserved the right to move during the course of the trial with respect to striking out evidence and exhibits as incompetent, irrelevant and immaterial.

• • •

(1053) The Court: Weren't you under an obligation to have your rights in order as of the date of the contract, the date it was executed?

Mr. Nickerson: Your Honor, let me—that was one of our obligations.

• • •

(1056) The Court:

I get the impression that in effect CAVE was an empty shell at the time this contract was executed. It had a franchise, to be sure; it was a franchise without expiration date; and there has been a good deal of testimony as to whether or not as of the end of August it was valid or not; in existence or not. But totally apart from that, it seems to me that USOA undertook to exploit this franchise, acting under the juridical canopy of this Venezuelan franchise, that CAVE offered them nothing in the way of a going business, and they had nothing to offer.

Mr. Nickerson: Except the franchise, your Honor.

The Court: Except the franchise. The naked rights set forth in that franchise.

Mr. Nickerson: And Colonel Marcano, of course.

The Court: Now what did they have a right to expect

that CAVE would do for them under this contract? Other than just getting those naked rights, because either they were leasing or renting a franchise, so to (1057) speak, or they were not; either there was mutual performance in the mutual expectation of mutual performance or there was not. What was it that CAVE was expected to perform; what did they perform pursuant to such reasonable expectation?

* * *

(1062) The Court: Yes, but aren't you indulging in some rather fanciful speculation when you say that?

Here was a company which was as close to being in a position of non-operation and complete frustration as it is possible for it to be. It had sold its equipment. It no longer was running schedule flights. It had lost substantial amounts of money. It had lost a very substantial amount of money just before this contract was executed. It had in effect nothing but its debts and its franchise. USOA came into the picture and it looked like these young American (1063) fellows were really going to make a going business out of it, and it collapsed almost as soon as it started. But the fact of the matter remains that the Venezuelan company was hardly more than a company in imminent danger of collapse. True, it had a valuable franchise.

* * *

The Court: A Venezuelan franchise in the hands of a group of individuals who are collecting debts, who are unable to maintain and run their airplanes, who can't meet their schedules, who have sold their equipment to pay their debts, is hardly a matter of having the right to come into court and say, "I want $100,000 for a year and for two successive years," when neither they nor anybody else were ever able to exploit it successfully——

1073) Mr. Nickerson: All right. May I discuss it?

Your Honor, the franchise, Exhibit BJ, gives, as your Honor has seen, a right to exploit transportation rights in and out of the country. Now USOA's interest of course was that that right to fly in and out would continue. They were not interested in any (1074) theory. They were interested in whether the federal Executive—and there was only an Executive department in Venezuela—would prevent them from flying in and out of the country. As a matter of fact, they did not prevent them at any time, and they would have been the only ones, they did not prevent them during the time that they did fly, and the federal Executive, after receiving a fair summary of it, and this the Spanish judge did not refer to, after receiving a fair summary of the contract, namely, that USOA associates itself with CAVE, USOA supplies two aircraft and a third one in case it needs it, USOA furnishes working capital, USOA furnishes all the technical help needed by CAVE, USOA agrees to train the Venezuelan personnel, and so forth, and in exchange for that, USOA would have an option on 40 percent of the stock also.

After they received that fair summary and after, as Colonel Marcano testified, he told them what his arrangement was with USOA, they renewed the franchise and they asked the Foreign Relations Department to get rights for them.

* * *

(1106) The Court: I will tell you right now that I find no substantiation in this record for a representation by CAVE upon which Mr. Cox had any right to rely with respect to the traffic carried or to be carried. I think it was a matter that both parties went into in some detail. Cox independently investigated with respect to which statements were made in the so-called prospectus. But if this condition 1(j) is anything, it isn't a representation.

It may be a prediction or condition or continuation by which both parties may have assumed as the architecture or as the basis for the architecture of the contract, and it may be a situation of mutual mistake so far as traffic was concerned, but it certainly isn't a representation made by one party upon which the other one had a right to rely. Assuming that it was the latter, assume that it is what I think it might be, then what legal consequence flow from that?

Let us assume Colonel Marcano said, "Here I think there are going to be two roundtrips per week." Cox said, "I think there are going to be two roundtrips (1107) per week."

And then they say, "Let us make a contract; we both make that assumption." Then it turns out that they are both mistaken; neither one is to blame, both have made an oral, honorable, honest statement or prediction."

Now let us assume they are both mistaken. What legal consequences flow from that?

* * *

(1131) The Court: I think you gentlemen have covered the ground. I shall certainly give my best efforts to it. I want to thank both of you for your very conscientious attention and your obvious efforts to be helpful to me, which I appreciate very much.

(1132) Now I am going to dismiss the cause of action relating to fraud and deceit, and I take it that will require—

Mr. Schoenwald: I would like to make some motions, your Honor, which have not been placed on the record.

The Court: Well, would you let me make this ruling with respect to the complaint first.

I assume that your motions do not refer to the complaint.

Mr. Schoenwald: They refer to amendments to the complaint, conform the pleadings to the proof.

Colloquy.

The Court: Well, then, you had better make your motions first.

Mr. Schoenwald: If your Honor please, I should now like to move generally to amend the pleadings to conform to the proof as it developed in this case to include as an alternative count the illegality of the agreement, the existence of a mutual mistake, and a failure of consideration running from the defendants to the plaintiffs.

The Court: Motion granted.

• • •

(1133) The Court: I grant the motion to dismiss all of the allegations in the complaint based upon fraud, deceit and breach of fiduciary obligations.

Now that would eliminate which sections from this complaint? I think that you have used the term "count". Which counts?

Mr. Schoenwald: The first count in the fraud count. The second count refers to negligent misrepresentations.

The Court: That is also a form of fraud, so that is dismissed.

Mr. Schoenwald: The fourth count in part refers to fraud and deceit in that it alleges an improper act upon the part of the defendants to prejudice the title and to gain control of the airplane.

The Court: That is also a count that I dismiss. That sounds in conspiracy, and that was a matter that I was trying to think about before. I don't find any basis for sustaining that count, so that the fourth count is dismissed.

(1134) Mr. Nickerson: And the third relates to the fiduciary relation.

The Court: Yes, the first three and the fourth are dismissed. That leaves you with the second.

• • •

(1135) Mr. Schoenwald: Each paragraph of the fourth count relates to a plan to convert, seize and detain the

property of the plaintiff, and, your Honor, during the course of the argument you asked whether or not we had stated any claim for interference with our use of the aircraft and I wanted to direct your attention to this part of the complaint.

The Court: I will consider that only as an item of damage under your breach-of-contract claim, but I will not sustain this cause of action. That is, I find that the cause of action is not sustained by sufficient credible evidence, and I therefore dismiss it. So that eliminates from the case three of your four causes of action.

Mr. Schoenwald: That is correct.

The Court: Your fraud, your breach of fiduciary obligation, your conspiracy, and it leaves in the case your claim for breach of contract; is that (1136) right?

Mr. Schoenwald: That is correct.

The Court: Which is your second count; is that right?

Mr. Schoenwald: It is our third count, if your Honor please.

Mr. Nickerson: It is woven into the third count I think, your Honor.

The Court: Even the third count makes allegations of fiduciary relationship. Is the third count the closest you come to charging plain breach of contract without throwing in conspiracy, fraud, deceit and fiduciary breach? Is that the one?

Mr. Schoenwald: Yes.

The Court: All right.

Mr. Schoenwald: It also includes the reference to certain standards, but it both sets forth the amount as it relates to fiduciary duties and separately as it relates—

The Court: I will grant the motion to dismiss from the third count any allegations of fraud, deceit, breach of fiduciary relationship or conspiracy, so that the third count will be reduced in its purport to a breach of contract cause of action. Do I make myself (1137) clear?

Colloquy.

Mr. Schoenwald: I understand.

The Court: Do I understand correctly that the rest of the amended complaint is dismissed: the first, second and fourth counts are the counts which have to do with the allegations I have already referred to?

Mr. Schoenwald: I understand your Honor so ruled.

The Court: I have dismissed them, but I want to be sure they are in the counts.

• • •

(1138) The Court: • • • I want to be sure that I am eliminating fraud, deceit, conspiracy and breach of fiduciary obligation and removing those contentions from the case.

• • •

(1139) Mr. Nickerson: May I have an exception, if your Honor please, to preserve my record?

The Court: Yes, of course, and Mr. Schoenwald has exceptions to all my rulings.

Mr. Schoenwald: I think there is a misapprehension. Did I understand your Honor to take cognizance and approve of my motion to amend the complaint to include my count for what we generally know as illegality and failure of the condition to eventuate and failure of consideration?

The Court: Yes.

• • •

(1140) Mr. Schoenwald: I would like to move too, your Honor, with respect to the various particular items of damage claimed by the defendants in their counterclaim.

Your Honor has already ruled with respect to that part that deals with the option, so I feel that the motion is unnecessary. I draw your Honor's attention to 22 of the counterclaim and the calculation for one year less the 60-day period provided in the contract, as I take it, is $132,000 not $144,000.

Mr. Nickerson: I took the actual weeks. Whatever the arithmetic is. I will redo the arithmetic, your Honor. I won't put you to that burden.

Mr. Schoenwald: I move for a dismissal of the claim for $144,000 on the ground that there has been inadequate evidence on the part of the defendants to show any effort to mitigate the damages or to employ the remaining $250,000 other than the funds in Spain to endeavor to mitigate the damages; and with respect to 22-F and the claim for $36,000—

The Court: I reserved decision.

(1141) Mr. Schoenwald: Yes. With respect to the claim for $36,631.21, I think that—

Mr. Nickerson: That is now reduced, your Honor. I reduced it to $21,234.53.

Mr. Schoenwald: With respect to the claim for loss of franchise, I likewise move that that was not an item of damage within the contemplation of the parties and that there was insufficient evidence of the defendants' willingness and effort to mitigate the damages in connection with or to employ the funds or facilities or resources available to him in order to endeavor to continue the operation of the franchise, and that I further ask that it be dismissed on the ground that it is too remote and too speculative a possibility to be within the contemplation of the Court.

The Court: I will reserve decision.

* * *

(1144) Mr. Schoenwald: I think I want to file with your Honor Mr. De Cervera's memorandum that we spoke of during the course of the trial.

The Court: Oh, yes. Is there any objection?

Mr. Nickerson: I have never seen it.

The Court: Suppose you show Mr. Nickerson a copy and then submit it to me with your conclusions. I think I agree that Mr. De Cervera should be permitted to submit

in writing a clause-by-clause comparison. Is that what he has attempted to do?

(1145) Mr. Schoenwald: Yes.

Mr. Nickerson: Am I going to have a chance to have my man submit one in answer?

The Court: If you wish, but on the same basis, on the same comparison.

Mr. Nickerson: Yes.

The Court: Then I suggest that you submit it with your findings and conclusions and we will consider them to be part of the record or part of the testimony of your expert.

Mr. Schoenwald: I don't want to appear to pettifog but Mr. De Cervera is, as you know, going immediately to Europe and while we did specifically arrange to have Mr. De Cervera's memorandum to be submitted to your Honor because we did not present certain testimony, in lieu of that testimony we arranged to have his memorandum submitted.

Now we made no such arrangements with respect to Mr. Nickerson's expert witness, and if such material is submitted by Mr. Nickerson's witness, I will be in no position to use Mr. De Cervera to comment or reply.

The Court: It is only on the very matter about which Mr. De Cervera has already prepared his memorandum. I am not letting him go beyond that. He (1146) does not have to reply to his own memorandum. He is taking the position with respect to these specific clauses and it is only with respect to these specific clauses that I understand Mr. Nickerson is asking for an opportunity to submit a memorandum.

Let me see it. I want to be sure I am not misunderstanding.

Mr. Schoenwald: As a matter of fact, it was handed to me so late last night I only assumed its correctness and relevancy.

The Court: Yes. This is what I had in mind. He takes up seriatim each clause of the franchise.

I will grant Mr. Nickerson the right to submit a memorandum, confined, however, to the very terms of this memorandum so that Mr. Schoenwald is not placed in any condition of apprehension about it. You see, your trial should be the conscientious search for the truth, and to the extent that either party is imposed upon we should try to adhere to that.

All right.

* * *

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No. 5391

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United States Court of Appeals
FOR THE SECOND CIRCUIT

CIVIL ACTION No. 72-376

UNITED STATES OVERSEAS AIRLINES, INC., RALPH W. E. COX, JR., R. W. E. COX, LETITIA COX, co-partners doing business as Ocean Air Tradeways; and RALPH COX, JR., LETITIA H. COX, REBEKAH L. MCSWEENEY, and ANDREW L. COX, a partnership, doing business under the firm name and style of OCEAN AIR TRADEWAYS,

Plaintiffs-Appellants-Appellees,

against

COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA, S.A., AEROVIAS VENEZUELA EUROPA and JORGE MARCANO,

Defendants-Appellees-Appellants.

ON APPEAL FROM JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO BRIEF OF DEFENDANTS-APPELLEES-APPELLANTS

HALE STIMSON RUSSELL & NICKERSON,
Attorneys for Defendants-Appellees-Appellants,
122 East 42nd Street,
New York, N. Y.

COURT OF APPEALS

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United States District Court
SOUTHERN DISTRICT OF NEW YORK

CIVIL No. 72-376

UNITED STATES OVERSEAS AIRLINES, INC., and RALPH W. E. COX, JR., R. W. E. COX, LETITIA COX, co-partners doing business as Ocean Air Tradeways, and RALPH COX, JR., LETITIA H. COX, REBEKAH L. McSWEENEY and ANDREW L. COX, a partnership, doing business under the firm name and style of OCEAN AIR TRADEWAYS,

Plaintiffs,

vs.

COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA, S.A., AEROVIAS VENEZUELA EUROPA and JORGE MARCANO,

Defendants.

Before: Hon. EDMUND L. PALMIERI, District Judge.

New York, June 15, 1956
10.30 o'clock a.m.

APPEARANCES:

MAURICE L. SCHOENWALD, Esq., Attorney for Plaintiffs;
MAURICE L. SCHOENWALD, Esq., and
BERNARD B. POLAK, Esq., of Counsel.

HALE STIMSON RUSSELL & NICKERSON, Esqs., Attorneys for Defendants;
EUGENE H. NICKERSON, Esq., of Counsel.

* * *

[9] Mr. Schoenwald:

* * *

I made an application for the adjournment of this trial because the person we expected would testify as to damages, Mr. Herbert Goldberg, was taken ill with a heart attack and is still ill, and counsel offered to permit me to introduce a document which would indicate what Mr. Goldberg would have testified to if he had been here, and this is contained in a stipulation.

Testimony

• • •

[13] RALPH COX, JR., called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

• • •

[78] The Court: In other words, the purport of it was you made your complaint and they told you to go [79] ahead and perform?

The Witness: Yes.

The Court: You told them you couldn't perform and it ended on a note of disagreement, without anything being agreed to?

The Witness: That is correct.

• • •

[82] *Cross-examination by Mr. Nickerson*:

Q. Mr. Cox, what office do you hold in United States Overseas Airlines? A. Vice-president.

Q. Are you still a member of the partnership of Ocean Air Tradeways? A. Yes.

Q. Were you president of U. S. O. A. in 1951? A. I was.

Q. When did you become vice-president? A. A couple of years ago.

• • •

[84] Q. How long had you been in the aviation business in 1951? A. Do you mean when did I start to fly as a pilot or in business as such?

Q. In any capacity. A. I started in aviation in 1939.

Q. When did you start in USOA? A. USOA became operative in January 1951. Prior to that there was an Ocean Air Tradeways operating, which started in 1946.

Q. What kind of operation was that, Ocean Air Tradeways? A. It was the same as the USOA operation. It was a non-scheduled U. S. carrier type operation.

Q. Transporting passengers, mail, cargo? A. We were never permitted to carry mail. We did transport passengers and cargo.

Q. Did you have any other companies that you were connected with in the aviation business in 1951? A. No.

• • •

[85] Q. How many employees were there of USOA? I am now referring to United States Overseas Airlines as USOA. You understand that? A. Yes.

Q. How many employees were there of USOA in the summer of 1951, July? A. We had 50 to 75 employees, I believe.

Q. How many officers did you have? A. Four.

Q. Who were they, with the titles? A. I was the president and treasurer. Clemett, Earl Clemett, was a vice-president of maintenance. Lloyd Webb was vice-president of operations. R. L. McSweeney was the secretary.

Q. Did you have a man named Jones there? A. Yes.

Q. What was his title, if any? A. He was purchasing agent at the time.

Q. Did you have a man named Sanour? A. Excuse me. We had Mr. McCormick also as a vice-president. I had overlooked John McCormick.

[86] Q. What was his job? A. He was executive vice-president and he was the Washington representative.

Q. Did you have a man named Sanour? A. We did.

Q. What was he? A. He was a pilot and general business administrator with us.

Q. Wasn't he a lawyer? A. He was a graduate lawyer.

* * *

Q. Mr. Cox, you testified on your direct examination that in May 1951 you were in Europe. When did you go to Europe? A. May of 1951.

Q. Yes, what time in May? A. Around the middle of May.

Q. Were you over there on business of the USOA? A. I was on business generally, yes.

Q. Where did you go in Europe? A. We went to Paris, England, Germany; I think Italy.

Q. Where did you go in Italy? [87] A. Where did I go in Italy? Milan and Venice.

Q. While you were in Paris did you receive any correspondence concerning AVE? A. I believe I did, from Mr. Clemett.

* * *

Q. I show you copy of a letter dated June 5th and I ask you whether you received the original of that when you were in Europe. A. Yes, this appears to be a copy of what I received.

Q. Do you notice in that, Mr. Cox, the sentence "Contact AVE in Rome, Italy for complete picture on business from Rome to Venezuela"? A. I notice that.

Mr. Nickerson: I offer this in evidence, your Honor.

• • •

[88] (Received in evidence as Defendant's Exhibit BQ.)

Q. Had you heard about AVE prior to the date of that letter? A. Yes.

Q. Whom had you heard from? A. From one of our pilots by the name of Patton.

Q. How long before that letter was it that you heard from him? A. Oh, I would say two or three weeks.

Q. Did you contact AVE in Rome, Italy for the complete picture on business from Rome to Venezuela when you were in Europe? A. I can't recall if I did. I don't think I did. Jones may have sent them a wire. But if my recollection is correct, we never received any reply or it was missent or something.

Mr. Nickerson: Do you have a copy of that wire?

[89] Q. I show you Defendant's Exhibit C for identification and ask you if you received that letter. A. Yes, I think I received this letter.

Mr. Nickerson: I offer that in evidence.

• • •

(Received in evidence as Defendant's Exhibit C.)

• • •

[90] Q. Defendant's Exhibit C, Mr. Cox, appears to set forth certain communications from Clem to Fritz and Fritz to Clem. Can you tell us who Clem was? A. That was Clemett, Earl W. Clemett.

Q. And can you tell us who Burger was—I am sorry—who Fritz was? A. Fritz refers to Fremont Burger, our chief pilot.

Q. I show you Defendant's Exhibit D for identification and ask you whether that is the communication which you referred to, which Jones sent to AVE. A. Yes, this looks like a copy of the—

Mr. Nickerson: I will offer that in evidence.

A. (Continuing) —telegram. We never received an answer to that.

Mr. Schoenwald: No objection.

(Received in evidence as Defendant's Exhibit D.)

* * *

[91] Mr. Nickerson:

* * *

Is it conceded that Defendant's Exhibit C is dated June 7, 1951?

Mr. Schoenwald: Yes, it is.

Q. On Defendant's Exhibit D, Mr. Cox, Mr. Jones describes himself as general manager. Was that correct? A. That eventually became correct. I don't know the date.

Q. June 10, 1951? A. Then he at that time was general manager.

Q. Was he over in Europe with you at that time? A. He was.

Q. Mr. Cox, did you talk with one of your vice-presidents, Mr. Webb, in London about AVE in June of 1951? A. I spoke to Webb. I think he came over as a [92] crew member and went back around that time, and he volunteered that he would look into this, the possibilities of this operation, when he returned to the States.

I said, "Well, go ahead and do it."

Q. Have you your diary here, Mr. Cox? A. No, I don't.

Q. Didn't bring it with you? A. No.

Q. I will read from your deposition. See if this refreshes your recollection as to what your diary said on the date of May 31, 1951:

"Lloyd called at about eleven p.m."

Who is Lloyd, Webb? A. That would be Webb.

Q. "436 is loaded and ready to return to the United States and he is going along since so much needs to be done in New York and he will try to contact AVE in Caracas."

Do you recall inserting that in your diary? A. That is probably correct, yes.

Q. Do you recall whether it is correct? A. I cannot recall inserting it.

Q. I will show you your deposition. [93] A. If it is in there, it is in there.

• • • •

A. That is substantially what happened, to my recollection.

Q. Do you recall whether that language that I have read is in your diary? A. Not without checking the diary. It sounds like it, though.

Q. Will you bring your diary tomorrow? A. I don't know where the diary is.

Mr. Nickerson: Mr. Schoenwald, will you bring Mr. Cox's diary tomorrow?

Mr. Schoenwald: If I have it. I don't think that we have it.

Q. Did you dispose of it, Mr. Cox? A. No, I never dispose of things like that.

Q. Where is your diary, do you know? A. It is probably at my home.

Q. Is that where you generally keep it? A. That's right.

Q. Will you bring that tomorrow, Mr. Cox? A. Well, I would have to have it sent in. It [94] isn't locally available.

• • •

The Court: Were you reading from a deposition taken before trial?

Mr. Nickerson: Yes, sir.

The Court: In the absence of the diary itself, I take it there would be no quarrel with any entry from the diary read into the deposition, it would be accepted as secondary proof.

Mr. Schoenwald: We are not making any objection to the use of the text of the deposition.

• • •

[96] Q. I will show you Defendant's Exhibit E for identification and ask you whether you received a copy of that. A. Did you ask me if I got a copy of this?

Q. Yes. A. I probably did, but I don't recall it. It is from Clemett to Bush.

Mr. Nickerson: I will offer it in evidence.

Mr. Schoenwald: I am not going to object to its admission as an exhibit.

• • •

[97] (Received in evidence as Defendant's Exhibit E.)

• • •

[98] Mr. Nickerson: May I have a letter dated June 17th from Clemett to Cox? I don't have a copy.

Q. I show you copy of a letter dated June 17th, addressed to "Dear Ralph" and signed by "Clemett" and ask you whether you received the original. A. Yes, I believe I received the original.

Mr. Nickerson: I offer that in evidence. That will be BR, your Honor.

• • •

(Received in evidence as Defendant's Exhibit BR.)

Q. Do you recall, Mr. Cox, after you got back from Europe, who was the first person in your organization that you talked to about AVE? A. McCormick, I believe, was the first.

Q. Let me refresh your recollection. On page 14 of your deposition, where you say, "When I got back from Europe I heard about AVE from a man by the name [99] of Waters." Do you recall whether or not—does that refresh your recollection whether he was the first one you talked to? A. It doesn't recall to my recollection he was the first because when I got off the ship I was met by McCormick, whether—

Q. It doesn't refresh your recollection? A. And at that time—

Q. Excuse me. A. At that time I hadn't even met Waters. I didn't meet him until two or three days later.

Q. When was Waters hired by you? A. He was hired when I was in Europe, sometime in June, I think.

Q. And you did talk to him after you got back from Europe, did you? A. After I got back to Wildwood. First I stayed in New York a couple of days. Then I spoke to Waters—I met him and I spoke to him.

Q. Didn't you know whether Waters had been employed by AVE prior to the time he was employed by USOA? A. I believe he stated he had.

Q. Did you talk to him about the potential of [100] the operation at all? A. It seems to me Waters took part in a conversation with McCormick and Burger and Clemett down in Wildwood, but it was basically communications and Waters telling us how familiar he was with Spanish and of the type of operation down there.

Q. Did you know whether Mr. Waters had been over the AVE route before? A. It seems to me he told me he had been over it in his position down there with AVE before.

Q. Does this sentence from page 18 of your deposition refresh your recollection as to whether you talked about the potential with Mr. Waters, reading from the middle of the page: "He understood they had a potential of two trips a week between Venezuela and Europe"? Do you recall discussing that with Waters? A. Probably I did.

Q. Do you recall that it was Waters who made the arrangements for Colonel Marcano to meet with Mr. McCormick or tried to make arrangements? A. I don't know if he did or not.

Q. I will read from your deposition, page 23: "I spoke with McCormick by telephone from [101] Wildwood. He was in Washington. And it seems to me that Waters had made arrangements or thought he had made arrangements for Marcano to meet McCormick"?

Does that refresh your recollection? A. Yes, that does.

Q. After you got back did you talk to Clemett about the AVE operation? A. Yes.

Q. What was Clemett's position with the company? What was his function? I know he was a vice-president. A. He was in charge of maintenance.

Q. Was he a vice-president? A. That's right.

Q. Did you talk with Webb after you got back to the United States about AVE? A. I believe so, but it was mostly Clemett and McCormick, really, mostly McCormick and Burger.

Q. You also talked with Burger, did you? A. That's right.

Q. Do you recall that you kept after McCormick in order to make an appointment with Mr. Marshall or Colonel Marcano to discuss entry into a deal? A. I don't recall keeping after McCormick. McCormick was in Washington, and just whether he kept [102] after Marshall or vice versa I don't recall. Usually McCormick and I spoke every day on the phone, though, about other business.

Q. Page 26 of your deposition: "After my conversation with Waters, I called McCormick to see what he had done, if anything, or what had transpired."

Do you recall calling McCormick and asking that? A. I probably did. I can't recall the conversation, but I was quite sure, as I say, well, that I spoke every day to McCormick.

Q. Did you ask him what he had done? A. Yes.

Q. With respect to AVE. A. I believe I did, yes.

Q. In your conversations with Mr. Clemett in or about June of 1951, did he make any argument to you that a deal with AVE wouldn't be a good deal? A. On the contrary, Clemett was the one that—Clemett had that Pollyanna viewpoint towards almost everything—he was in favor of it because we didn't have too great an operation. We were dependent from time to time on military contracts, and he thought it would be a good idea to get a schedule run going, if [103] I remember correctly, and there were a lot of conversations back and forth. One day we thought it sounded good, the next day we thought it didn't sound so good. We didn't know too much about it; it was a speculation.

Q. So Clemett was the one who thought it would be a good opportunity, did he? A. Clemett wrote me two letters in Paris, and was really the first one I heard about it from.

Q. You are sure he didn't argue to you that it wasn't a good opportunity? A. If he did, I don't recall it.

Q. Are you sure he did say that? A. I am fairly certain. All of us viewed it with favor, provided—

Q. Now I am asking you about Clemett and only about Clemett. A. Clemett took part in the conversations. It wasn't just Clemett and me. We were all in this thing together.

Q. Did you know who Gotch & Crawford were, Mr. Cox? A. No, I did not.

Q. Had never heard of them before, had you? [104] A. No.

• • •

[105] Q. How long had Clemett been with you, Mr. Cox, in 1951, July?

• • •

A. I think he had been with us for around six [106] months.

Q. How long had Burger been with you? A. Probably —I think Burger came with us around the first of the year, around Christmastime, thereabouts, of 1950.

Q. How long had Webb been with you? A. He had arrived a couple of months after Clemett, in the spring of 1951.

Q. How about Mr. McCormick? A. McCormick had been with us for about ten months probably at that time.

• • •

[112] Q. Do you or do you not recall what the general outline of the proposed operating arrangements was? A. Right now I don't recall it. I would have to read it over again.

Q. Do you recall that in those proposed operating arrangements AVE was to retain responsibility for procurement, promotion, reservations and ticketing of all traffic? A. That is what they proposed, but we said that we weren't interested in having traffic separated, so [113] that we would just take it or leave it when it was generated and not control tariffs or, rather, the commissions, and the policies of procurement, et cetera. We were specifically discussing that, referring to generating traffic in American colleges out of Bermuda, which was talked about to some extent, and I didn't feel we should be faced with a ticket agent coming along in the middle of this thing and saying, "We want 40 percent," or something like that. That is when I said we are going to have to have control of this traffic.

Q. So right from the beginning, Mr. Cox, you told Mr. Marshall, did you not, USOA wanted control of all traffic procurement, did you? A. Or words to that effect. I might add that particularly all traffic in Rome was entirely—

• • •

[117] Q. Let me read from your deposition, page 88: "He (referring to Mr. Marshall) said that openly the Venezuelan embassy would probably not embarrass themselves too much by showing partiality to AVE."

Do you recall that? A. That's right, he said that.

Q. Do you recall testifying to that? A. Yes, I do, and that he further stated—

Mr. Nickerson: I move to strike it out. This witness will not remain responsive to my question.

The Court: Yes.

• • •

[120] Q. Who drafted Defendant's Exhibit G? A. Burger drafted this, to my best recollection.

• • •

[121] Q. Did you make any change in it? A. After Burger drafted it?

Q. Yes. A. I don't recall; I might have.

Q. You know you made no changes in it, don't you? A. We are looking back five years. We went over these notes. He made a rough draft and then—usually he made a rough draft and then a smooth copy. There may have been some changes but if there were I don't remember.

Q. Have you refreshed your recollection for this trial by reading your deposition? A. Some time ago. I haven't had a chance to do it in the—to do it recently.

Q. I read from page 100, next-to-the-last question:

"Q. Did you change anything that Mr. Burger had written? "A. No, not that I recall."

Do you recall that testimony? A. Yes. Just about what I said now. I don't recall.

[122] Q. From page 100:

"Q. Do you have a prior draft of Defendant's Exhibit G? A. I don't know of any such thing."

Do you recall that testimony? A. I can't recall it. What is G?

Q. G is the exhibit I just showed you, the letter dated July 19th. A. Do I have a prior draft of that? I don't recall.

Q. Do you recall that testimony? A. That is in 1951, that testimony, isn't it, or 1952?

Q. Do you recall that testimony? A. I don't recall stating it just that way. If it is in there, I must have said it.

• • •

[125] Q. Were there any prior drafts of the letter of July 21st, Defendant's Exhibit I, Mr. Cox? [126] A. I cannot recall.

Q. I will read from your deposition, page 112:

"Q. Did he (referring to Burger) make any prior draft? A. I don't believe there were any such."

Do you recall that? Does that refresh your recollection? A. Yes.

Q. Do you recall making a reference to the draft of—to the letter of July 21, 1951, Defendant's Exhibit I, in your diary? A. I don't recall.

Q. Have you read your diary since you were examined on your deposition? A. No.

Q. I will read from the top of page 117, your testimony, as to what is contained in your diary for July 21, 1951, Saturday:

"Burger and I worked out an answer to Marshall's telephone call regarding AVE and I hope it is accepted."

Do you recall that? A. I probably wrote that, yes.

Q. Did you have any discussion with Mr. Marshall [127] about the provision in the contract which recites—it is IG, in the third sentence—"The president of CAVE shall be reimbursed by Overseas for actual business expense and, subject to the attainment of an annual average load factor of not less than 50 percent, shall also receive an annual salary of $15,000 a year."

Did you discuss that load factor of not less than 50 percent with Mr. Marshall?

• • •

A. I believe so.

Q. When you signed the contract on July 25th, Mr. Cox, who was present? A. Miss Wilcox, McCormick, Marshall, and I think Burger.

Q. Sanour was there, wasn't he? A. Was he there? I don't remember if he was there or not.

Q. Do you recall whether he was or not? [128] A. I don't recall his being there. He may have been.

Q. I show you Defendant's Exhibit Q for identification and ask you whether you signed the original.

• • •

A. Yes. I gave that letter to Mr. Burger.

Q. Can you recall the date when you signed it, approximately? A. It must have been about the time that he left with the airplane for Caracas from Wildwood. That is my best recollection.

Q. About what date was that? A. I would have to check those log records. It was around the middle of August, I think.

Mr. Nickerson: I offer it in evidence.

• • •

(Received in evidence as Defendant's Exhibit Q.)

[130] Q. I show you Defendant's Exhibit P for identification.

• • •

[131] A. Yes, I believe this came from Burger.

Mr. Nickerson: I offer that in evidence.

• • •

(Received in evidence as Defendant's Exhibit P.)

• • •

Q. Mr. Cox, do you recall this testimony from your deposition:

"Q. Did you discuss Mr. Waters' analysis? That is the exhibit that has just been marked. A. I considered Mr. Waters, who told me he had gotten a couple of books published, was a little verbose on some of his comments, but I took into consideration the experience and background of his knowledge of this AVE operation."

• • •

[132] A. Yes.

Q. "I did feel that Waters was primarily a flight communications expert but not an overall expert on every single phase. However, his comments on other departments we did not take lightly because he has been over

the runs and he knew these people and we had to start somewhere."

Do you recall that testimony? A. I believe I do.

Q. Did you discuss Defendant's Exhibit P, which has just been marked, with anyone at the time you read it? A. Is that signed by Burger or Waters?

Q. Waters. A. That is Waters? I think I discussed it with Burger.

Q. Did you discuss this sentence with Burger: "Madrid was the most difficult to manage in the European area during AVE's past experience for many reasons. The laws were difficult to comply with, dollars are practically impossible to remove from the country. [133] Thus, only token passengers should be loaded at Madrid."

Do you recall discussing that with Mr. Burger? A. That is westbound out of Madrid, isn't it?

Q. What I read, do you recall discussing it? A. Yes, I think we discussed that.

• • •

Q. When did you discuss it? A. This was prior to our going down to Venezuela or else it was prior to our sending the airplane down. These were all Mr. Waters' comments.

• • •

[134] Q. Do you recall discussing with Mr. Burger whether Paris was a trying station? A. No, I don't recall that. We weren't even going to go into Paris, certainly not in the initial phases.

• • •

Q. As a matter of fact, on your first flights you considered that Portugal was only going to be the fuel stop,

didn't you? A. We assumed full loads westbound, sir. We were only going to stop for fuel, that's right, but we anticipated developing it.

• • •

[136] Q. Do you recall that Colonel Marcano told him in the presence of you and several others of USOA that he should give you any information that you wished that [137] was in the books? A. I don't recall that.

Q. Do you recall that he didn't say that? A. I don't recall that he said it or not.

Q. Do you recall you requested the by-laws of CAVE? A. It seems to me we did.

Q. Did you get them? A. I think we did.

Q. Do you recall that you asked Colonel Marcano to come to—cancel an agency contract which he had with an agent in the United States? A. Along the lines of our wanting to control the traffic, yes, we asked that he cancel, I think it was, Red Air or some such name, up in New York.

Q. Do you recall whether he did do it while you were down there? A. He said he sent a wire doing so.

Q. Did you see the wire that he sent? A. I think we had copies of that wire. I cannot remember offhand.

Q. I show you Defendant's Exhibit U and ask you whether you saw a copy of that? A. It seems to me I recall seeing this.

[138] Mr. Nickerson: I offer it in evidence.

• • •

(Received in evidence as Defendant's Exhibit U.)

Q. When you came back from Caracas, after that trip, did you leave anyone down there from USOA? A. I think we left Waters down there.

Q. Did you leave Van Boheman? A. I can't recall if we left Van Boheman or not. We may have, though. I would have to check that.

• • •

Q. I will show you Defendant's Exhibit AC for identification, a cable from Burger to Cox, dated August 20, 1951, and ask you if you received the [139] original of it. A. I believe we received this at Wildwood, yes.

Mr. Nickerson: I offer that in evidence.

• • •

Q. What was the date, on or about the date?

• • •

A. This is the date—the day and month. That is 20/8. It must be August 20th but I cannot tell from that. That doesn't seem right. I don't think that is correct.

• • •

Q. I show you Defendant's Exhibit AL for identification and ask you if you received the original of that. [140] A. Yes, I think we received this too.

Mr. Nickerson: I offer that in evidence.

• • •

Q. Do you recall about when you received it? A. It is dated August 23rd, I believe, '51.

• • •

(Received in evidence as Defendant's Exhibit AL.)

(Defendant's Exhibit AC received in evidence.)

• • •

[141] Q. I show you Defendant's Exhibit AB for identification and ask you if you received the original of that on or about its date. A. Yes, we received this.

Mr. Nickerson: I offer that in evidence.

• • •

(Received in evidence as Defendant's Exhibit AB.)

Q. Did you give Mr. Burger permission to negotiate an inter-line agreement with Il Italia? A. In so far as USOA could do so, yes.

• • •

[145] Q. Have you been a defendant in quite a lot of lawsuits, Mr. Cox, you or your company? A. In quite a lot of lawsuits?

Q. How many?

Mr. Schoenwald: I would like that question to be clear. Is he talking about the company or Mr. Cox?

Mr. Nickerson: I will break it down.

Q. Mr. Cox, first, personally. A. Oh, I have been sued a few times, but I think quite a number.

Q. How many? A. I guess about three or four lawsuits I have had.

Q. And how about USOA? Has USOA been a defendant in quite a number of lawsuits? A. No, I would not say so.

Q. How many?

• • •

The Court: I will allow the question on [146] the condition that it be amended to provide that

it cover only the time of his connection with the company.

Q. While you were with USOA how many lawsuits has it been in? A. There have been two or three.

Q. Are you sure that is all? A. Well, are you talking about going to trial or being sued and various things?

Q. Suits brought against you. A. How is that?

Q. A suit that is brought against you irrespective of whether you went to trial. A. I can't tell you. Every once in a while some employee sues for some claim of some sort or other and it may go to trial and it may not.

Q. Didn't Waters sue you for his salary you didn't pay him? A. We paid him. We overpaid Mr. Waters. Mr. Waters had quite a claim there that was just fantastic.

Q. He sued you? A. He sued us, that's right.

Q. Didn't Mr. Warner sue you? A. Mr. Warner sued us, that's right.

Q. Was that for services that he rendered you? [147] A. And Warner set them up, set himself up as an expert over Burger, and claimed fantastic sums which weren't in the picture at all.

Q. USOA has had quite a history of violations of the Civil Aeronautics Administration? A. Oh, no, they haven't. No, they haven't.

Mr. Schoenwald: Objection.

Q. Let me ask you this. Has USOA ever had any violations alleged against it by the Civil Aeronautics Board for failure to maintain its records at its base—

Mr. Schoenwald: Objection.

The Court: Why are you going into this?

Mr. Nickerson: Your Honor, I want to show—

The Court: Relationship between the corporation and the civil regulating agency could not possibly affect the issues of this case or the witness's credibility.

Mr. Nickerson: I want to show the absolute disregard that this individual has for any legal processes and any regulation, and I have them here, they are as long as your arm, from the Civil Aeronautics authority as to what violations are outstanding against them, and I think that affects the credibility and it shows the absolute disregard these people—

[148] The Court: You see, we would have to undertake a trial within a trial in order to ascertain the merits and validity of these various violations. I could not undertake to do that.

Mr. Nickerson: Maybe he will concede some of them when I read them.

• • •

[149] The Court: Yes. Let me suggest this, you make an offer of proof and then I will rule on it. I am afraid I cannot let you go into it but I will permit you to make an offer of proof.

Mr. Nickerson: I offer to prove that USOA has had the following violations—had the following violations outstanding against it: in December 1951, one, failure to maintain aircraft and engine records at the company's principal maintenance base; two, operation of a propeller approximately 315 hours in excess of approved overhaul time; three, employment of flight navigator who was not in possession of an appropriate navigator and

medical certificate; four, operation of an aircraft with unsecured license, life raft, ladder, cargo, oxygen bottle, et cetera, in the aircraft; five, operation of an aircraft with a two-pilot crew in excess of prescribed flight time limitations; six, operation of an aircraft with a captain in command who flew in excess of flight time limitation; seven, failure to maintain proper airmen records; eight, failure to maintain complete flight manifest record; nine, failure to require pilot training in accordance with the company's operations [150] when his instrument and equipment standard checks had expired; eleven, operation of an aircraft with loose passenger seats, trunks and unsecured equipment in the cabin; twelve, operation of an aircraft with an insufficient number of seats and seat belts for the number of passengers aboard; thirteen, lack of proper pilot check by qualified company check pilot; fourteen, operation of an aircraft with a captain who flew in excess of prescribed limitation; fifteen, operation of an aircraft with a crew who flew in excess of prescribed flying time limitations; sixteen, failure to maintain records for 144 flights; seventeen, utilizing of five pilots in excess of prescribed flying time limitation; eighteen, operation of aircraft in trans-Pacific operations without the required radio transmitter frequency; nineteen, operation of aircraft in excess of maximum allowable gross weight limit; twenty, operation of aircraft again in excess of maximum allowable gross weight limits; twenty-one, same, twenty-two, the same; twenty-three, the operation of aircraft in an unseaworthy condition in that inadequate size

wire, an inadequate circuit breaker and improperly installed generator system were utilized aboard an aircraft.

[151] The next number, company scheduled its aircraft to meet its operational requirements without proper organizational coordination to insure adequate maintenance; next, company has failed to provide for its employees adequate and proper engineering and operational data to insure that the operation of its aircraft will be in accordance with the operating requirements of the civil air regulations.

Next, flight crews have exhibited a lack of requisite knowledge to operate aircraft communications equipment in international and overseas operations.

Next, routine control of maintenance of communications equipment is inadequate because of absence of a company inspection system as required by the civil air regulations.

Next, the company has failed to provide adequate engineering data and information to its maintenance personnel in order to provide for proper modification of the aircraft and aircraft components.

Next, company has failed to establish the required organization maintenance training program.

I offer to prove that.

The Court: Are you finished?

Mr. Nickerson: Yes.

[152] The Court: I sustain the objection on the ground that it would lead us far afield and involve us in issues which we are not called on to deal with in this case. It could not possibly have any relevancy here. I rule it out.

Q. As a matter of fact, Mr. Cox, you are in contempt personally of a judgment right here in New York, aren't you?

Mr. Schoenwald: Just a moment.

A. That is not—

• • •

Mr. Schoenwald: I also object to the examination of the witness in connection with the last [153] question. The only possible area of question of a witness's credibility would be his conviction of a crime. Unless the question encompasses a conviction of a crime, I feel it is improper.

The Court: You say the only way a witness can be impugned is by proving he has been convicted of a crime?

• • •

The Court: You may ask him whether he was in contempt of judgment.

Q. Is there a judgment outstanding against you in a separation action here in New York? A. No.

Q. Wasn't there a judgment against you? A. There was at one time.

Q. Didn't it provide that you should make certain payments? A. They were made.

Q. Yes, and you didn't come into the state, did you? [154] A. I had a child that was in danger of its life and I stayed out of the state with an infant then on a psychiatrist's recommendation, and I will do it again if it is the safety of my child, and that is the only contempt that was against me, sir, and it has been removed.

• • •

[158] *Recross-examination by Mr. Nickerson*:

Q. Mr. Cox, when you listened in on the telephone call that Webb and Colonel Marcano had—do you recall that one? A. Yes.

Q. Did you tell Colonel ~~Marcano you~~ were listening? A. Did I tell him?

Q. Yes. [159] A. No, I didn't tell him. I didn't speak to Colonel Marcano.

Q. Did Webb tell him that you were listening? A. I don't think so.

• • •

Q. Did you tell Colonel Marcano that you were making a tape recording of that conversation? A. No.

Q. You made other tape recordings of other conversations you had with people representing the defendant. didn't you? A. Did I do what?

Q. Made other tape recordings of other conversations that you had with people representing the defendant, didn't you? A. It seems to me I made a recording when Mr. Russell threatened me on the phone, yes.

Q. Did you make any other tape recordings with [160] people representing—conversations with people representing the defendant? A. Not that I can remember.

Q. When you made the tape recording, with Mr. Russell, did you tell him you were doing it? A. No, I didn't.

Q. Is it your practice to make tape recordings of telephone conversations?

• • •

A. Occasionally we make them.

• • •

[171] JORGE MARCANO, called as a witness by the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Schoenwald:

[172] Q. Colonel, where were you educated? A. In Venezuela.

Q. What was the nature of your education? A. I went to school, to high school, and went to navy school.

Q. Will you tell us, do you have any degrees? A. I didn't take any degrees except in the armed forces—rank in the armed forces.

Q. Have you held any administrative or executive position either in the military or in business? A. Yes, I have.

Q. What military executive positions have you held? A. I have been chief of different squadrons, pursuit squadron, bomber squadron, patrol squadron.

• • •

[215] Q. In your prospectus, on page 5, I think that you will find a recitation or a description of the condition of the company which does not show the possession of assets roughly comparable to $1,100,000, is that correct?

Mr. Nickerson: I think it speaks for itself.

A. These were moneys in Spain. They weren't at our disposal.

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[263] Mr. Schoenwald: If your Honor please, I don't want to encumber the record with undue argument. However, I thought that I understood the witness to indicate in his testimony that, as a matter of fact, that the office would function even in the absence of Mr. Savino. The letter is a letter from a person [264] characterized by the defendant to be his general agent or general officer or

general office manager in Italy. He states in this letter, made at the time of the event, that the office will not function.

The Court: Mr. Marcano said the business would continue to function when the successor was appointed. Isn't that what you testified?

The Witness: Yes.

The Court: Mr. Schoenwald, I direct you to pay closer attention to your own examination of the witness and not place me in the position of pointing out what the witness has testified to.

Mr. Schoenwald: Thank you, Judge.

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[325] HENRY SCHINDALL, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

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[344] *Cross-examination by Mr. Nickerson:*

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[351] Q. Mr. Schindall, you don't know whether those accounts receivable, other than the $261,000, which appears on Exhibit 6, were or were not collected and distributed, say, to stockholders, do you? You are just assuming that they were written off, aren't you? A. I see no evidence of dividends to stockholders, of any other collection, and I am assuming they were written off.

May I say that my experience with accounts receivable from employees, which remain on the books for long periods of time, and my experience with receivables of, other various sundry receivables which remain on the books [352] for a long time, is that they are seldom collected, almost always written off, at least substantially.

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Q. Can you tell us specifically whether any accounts receivable from Rome in 1950 were in fact not collected? A. No. It is possible that some were collected.

Q. I am just asking you what you can trace. Can you trace whether any accounts receivable from Paris were not collected? A. No, there is no evidence of collection.

Q. Now—excuse me, I am sorry. A. There is no evidence of collection.

Q. Yes. With respect to Lisbon, can you tell us whether any accounts receivable from Lisbon in 1950—can you trace whether they were not collected? A. No, sir.

Q. Can you trace whether any accounts receivable from Caracas, sales of tickets to passengers in 1950, were not collected? A. I am a little uncertain of the meaning of the word "trace" as you use it. Would you care to [353] explain it?

Q. Is there any record that you have seen that shows specifically that accounts receivable from sales of tickets to passengers in Caracas were not collected, other than—A. I don't recall.

Q. (Continuing)—your assumption from, the general assumption from the statement of estimated assets and liabilities? A. Yes.

Q. Which you have already told us as of June 15, 1951? A. May I explain this?

Q. Will you answer my question and then explain it? A. I don't recall. I say that because I examined a number of these original vouchers, called comprobanes, and I believe that some of them had entries showing writeoffs of accounts receivable.

Q. Do you recall the amount of those? A. No.

Q. In round figures? A. No. I recall seeing some writeoffs of that character.

* * *

[354] Q. You don't actually know from your examination of the books, do you, when the various accounts receivable which were written off became worthless, do you? A. No, sir.

Q. I think you testified on your direct examination that the reserve which appears on page 6 of Exhibit 357 of $126,316, reserve for exchange loss, that that should have been put on the books in 1950; did you testify to that? A. I believe so, yes.

Q. You don't know what portion of that is allocable to 1950 and what portion allocable to 1951, do you? A. Yes, I believe it is all allocable to 1950.

Q. Didn't they make sales tickets in 1951 in Spain? Didn't they put on their books pesetas in Spain in 1950? [355] A. My recollection is that this account existed at $250,000 at the end of 1950 and that it remains about the same. There were no collections, since no funds could have been gotten out of Spain.

Q. Yes, but they did make, or did they put on the books receipts of pesetas—perhaps that is the wrong word, I think—receipt of pesetas in 1951? That is the point I am asking. A. I don't know.

Q. In 1950 you know that this was an operating airline, do you not, Mr. Schindall? A. Yes, sir.

Q. And you don't know whether in 1950 whether they expected or not to be able to get their pesetas out of Spain, do you?

[356] (Question read.)

A. I am not sure I understand the question. Do you mean—

Mr. Nickerson: Would you read the question?

The Witness: May I ask—

Mr. Nickerson: Yes, go ahead.

The Witness: Do you mean were they aware during the year 1950 of the difficulty of getting funds out of Spain? Is that what you mean?

Mr. Nickerson: No, I am not asking that. Would you read the question again?

(Question read.)

A. No, I do not. May I say, in addition that I recall seeing correspondence during 1951, I believe, although I am not certain of the date, the tenor of which was there were difficulties so—

Q. In 1951 you saw that? A. I believe it was in 1951.

Q. Dated 1951? A. Early in 1951. There were several letters. Attempts were being made, apparently, to get this money but they weren't available.

Q. In a statement of estimated assets and liabilities, where it shows a loss, would that not [357] ordinarily put a person on notice as to the facts with respect to the loss? A. It would merely indicate a loss.

Q. Yes, but wouldn't a prudent person look at the facts at that loss? A. Yes.

Q. As an accountant? A. Yes.

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[359] JORGE MARCANO, Resumed.

Direct examination continued by Mr. Schoenwald:

[401] Mr. Schoenwald: I would like to offer this letter in evidence as a communication from the attorney in fact to his agent as of August 1st, a time before the withdrawal or rescission of the contract or any proceedings were commenced and as a letter showing the state of knowledge of the defendant, bearing upon his intent, a necessary element in the case of fraud, bearing upon wilful-

ness and by its very nature and damages, and dealing with the credibility of the witness, and, in so far as it relates to the stock, setting forth the knowledge of the defendant dealing with the shares of stock involved in this case. And I direct your Honor's attention also to the fact that it indicates the liability of this company CAVE as well as the Colonel to Flying Tigers, one of the liabilities not mentioned in the prospectus, in the two places [402] which I think are pretty important dates marked out in advance on the document.

Mr. Nickerson: It will take less time if I do not object to these and reserve my motion to strike them. May I do that?

The Court: All right. It will be marked in evidence.

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[403] Q. Did you send a communication—did you send this letter out?

Mr. Nickerson: We concede that it was, your Honor, 272 for identification.

Mr. Schoenwald: I would like to have this marked in evidence.

Mr. Nickerson: May I reserve my motion to strike? It will take less time.

The Court: Yes, all right.

(Plaintiff's Exhibit 272 for identification received in evidence.)

[404] Mr. Schoenwald: Do you also want to concede as to the admission of this document in evidence (indicating)?

Mr. Nickerson: I will let it in subject to my

motion to strike, your Honor. I am not going to object to any of this because it takes us more time.

• • •

[429] *Cross examination by Mr. Nickerson:*

Q. When were you first engaged in anything to do with aviation? A. 1928.

Q. Will you give us the various posts you held from that time up until 1950, when you became president of CAVE? Would you run through them rapidly. A. Yes. I was chief of different air units, chief of paratroop squadron, bomber squadron. I was instructor in the Aviation School.

I became Director of the Military School of Aviation. I came out to the States and spent one year here through school, a different outfit, U. S. Air Force outfit; went back and became Liaison Officer with the Canal Zone and military attache, assistant military attache in Panama. Went back to Venezuela, became Inspector General of Aviation.

After that I was Air Attache to the Venezuelan Embassy in Washington. After that I was Military Attache and Chief of Military Missions at the Embassy in Washington; chief representative in the Inter-American Defense Board.

[430] From there I went to Venezuela and became Minister of Communications. And after that I went to the United Nations as a representative to the United Nations.

Q. Did you ever see anyone from USOA prior to the time that the contract dated July 25th was signed by you? A. No, I did not.

Q. Did you ever hear from any of them? A. I did hear once from a man called Waters, who used to work

for my company, for AVE. It was a telephone call from Wildwood, he said. He asked me—

Q. What did he say, in substance, and what did you say?

Mr. Schoenwald: There has been nothing to indicate that Mr. Waters was an employee at this time of U. S. Overseas Airlines.

Q. What was the date of that call? A. That was late in May or early June; I think it was early June, 1951.

Q. What did he say and what did you say?

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[431] A. I was told by Mr. Waters that he was working with some people that would be interested in dealing with AVE to take over the operations, and that he wanted me to talk to them, and they were going to send a plane over from Wildwood and pick me up in Washington so that I could talk to them.

So I told him that we were having a study or report made about AVE and until such time as that report was out I did not want to talk to anybody about this operation.

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[432] Q. Did he give you, did he send you any report [433] dealing with passenger matters? A. Yes, he did.

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[435] Q. Tell us what your instructions were to Messrs. Gotch and Crawford, briefly. A. I told them, I explained to them what the operation was. I told them I wanted a study of it. They wanted to know the history of the company and certain statistics. We had two meetings with Mr.—I had and Mr. Marshall had two meetings with Mr. Gotch and Mr. Crawford. And I gave them verbally, orally, all the information I could. And then they asked

for certain statistics which I sent them through my company in Caracas.

Q. Did they ask for any records which you did not furnish them? A. No, they asked—everything they asked for I could give them.

Q. The material you furnished them was prepared— [436] by Mr. Morgan, was it? A. By Mr. Morgan in Caracas, yes.

Q. What was his full name? A. His name was Henry Morgan.

Q. How long had he been with you? A. He had been with me about that time about a year, approximately a year.

Q. Was he a former employee of Price, Waterhouse? A. He was a former employee of Price, Waterhouse.

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Q. Did you have confidence in Mr. Morgan? A. I did, yes.

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[437] Q. Do you remember that in the early part of August several of the personnel from USOA came down to Venezuela? A. Yes, I do.

Q. Can you tell us who was in the party? Maybe you have done that. Can I refresh your recollection? A. Yes. I think I remember. It was Mr. Cox and his wife, Mr. Burger, Mr. Van Boheman, Mr. Waters, Mr. Clemett. I think that was all.

Q. I show you Defendant's Exhibit F for identification and ask you whether you received that on or about the date of June 15, the date that it is stamped? A. Yes, I received this.

Mr. Nickerson: I offer that in evidence.

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[438] (Defendant's Exhibit F for identification received in evidence.)

Q. I believe, Colonel, that on your direct testimony you stated that you offered to show the books and records to USOA personnel. A. I did, yes.

Q. Did you have any conversation with them while they were in Caracas with respect to a Rome office in AVE? A. Yes, I did.

Q. Will you tell us what that was, briefly? A. I told them that we had an office in Rome that was near the office of TWA, 63 Via Barberini, in Rome, and that if they wanted that office I would be glad to make arrangements with them so that they [439] could have it.

I told them that I had had a previous arrangement with Mr. James Wooten about this office and about traffic generating in this office. They told me that they were not interested in having any kind of business with Mr. Wooten and that they thought that the maintaining of an office in Rome would be too expensive, too much overhead, and that they would advise me if they wanted the office. That is—

Q. And did you thereafter get any advice from them as to whether they wanted the office? A. Yes. I got a telegram, a telegram, yes, cable from Mr. Burger saying that they were not interested.

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Q. When was that, about? A. That must have been about the middle of August, about the middle of August.

Q. I will refresh your recollection on the date. It was after Mr. Burger went to Rome? A. It was after Mr. Burger went to Rome, yes.

Q. Did you have any conversation with them, with respect to turning over to them any equipment— [440] A. No.

Q. —in Caracas? A. No.

Q. Or any commissary materials? A. No, there was no conversation. When the plane went to Caracas it needed some commissary equipment; so I went to Chicago and Southern, whose manager was a personal friend of mine, and they let me have some commissary equipment which I passed on to the airplane so that they could make a trip.

Q. Did you turn over to them any blankets? A. Yes, some blankets and some pillows, and so forth.

Q. Did you ever get any of them back? A. No.

Q. Did you have any conversation with them in the early part of August with respect to any debt in Portugal? A. I don't remember.

[443] Q. Colonel, did you advertise the flight for August 15th? A. Yes, I did.

[444] Q. Was that flight canceled? A. It was canceled.

Q. Why was it canceled? A. The flight was to take off on the 15th, the morning of the 15th, and the airplane arrived late in the day of the 15th and it was not properly equipped at that time.

Q. Was the flight rescheduled? A. Yes, it was rescheduled for the 19th.

Q. Did it take off on that date? A. Yes, it did take off on that date.

Q. Did you thereafter get a cable—and if is already in evidence—dated August 22nd, Exhibit AI, from Mr. Cox urging you to go to Rome and that he was departing from Newark? A. Yes, I did.

Q. What did you do after you got that cable? A. After I got that cable I finished some papers I had to have for the naming of Mr. Mazzolini as immigration representative in Italy.

Q. I show you Exhibit AK for identification. Is that what you refer to? A. Yes, that is the document I have referred to.

[447] Q. When you got to Rome did you see Mr. Burger? [448] A. I saw Mr. Burger.

Q. Did you talk to him? A. I talked to him, yes.

Q. Will you tell us what he said and what you said, in substance? A. In substance, we talked about him having difficulty with the Embassy; so after I talked to the Ambassador I introduced him to the Ambassador.

Q. Introduced Mr. Burger? A. Introduced Mr. Burger to the Ambassador. After that we talked about different matters; we talked about something that had to do with the Alitalia thing, that he talked to Alitalia and Alitalia talked to him.

Q. What was your conversation with Mr. Burger about Alitalia? A. He said that the Alitalia people were opposing AVE going into Italy twice a week. So I explained to him that I had had that before and that we had never actually had any serious argument on that point, and since the last time we talked I told the Alitalia people, and had a friendly conversation, I told them, "If you don't want me to come here twice a week we will limit the number of passengers from [449] Caracas to Rome," which, apparently, which was not to their convenience, and the matter was dropped, and my recollection, is we might have brought it up again but it was never an issue.

Q. Just so I understand it, Colonel, how many stations did you have in Europe? A. We had four stations in Europe including Rome.

Q. So that your passengers in the Italy operation came from the four stations? A. From the four stations.

Q. The Alitalia ran from Rome direct to Caracas? A. Yes, sir.

Q. So that they had only the one station in Rome from which to take passengers out, is that right? A. That is correct.

Q. If I understand what you say, you told the Alitalia people that you had several stations to fill your airplanes up and if they made any trouble with respect to your two flights a week you would get your government to limit the number of passengers they could take out of Caracas; is that correct? A. That is what I talked to them, yes.

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[453] Q. Prior to the time that you got over to Rome did you have some requests from Burger to appoint a Mr. Mazzolini as legal representative? A. Yes, I did.

Q. Was that done by you when you got to Rome? A. Yes, that was done by me when I got to Rome.

Q. And was that done—was that under this [454] document AK for identification? A. Yes.

Q. Did you have any conversation while you were in Rome with Mr. Burger with respect to whether USOA did or did not want to take passengers from Spain paying in pesetas? A. Yes, from what I talked to him I understood him that they didn't want to take passengers from Spain. As a matter of fact, they left Mr. Waters in Madrid on the way back to set up a warehouse, bonded warehouse, to take cargo from other places rather than take passengers in pesetas.

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[456] Q. Do you recall how many passengers there were on the trip back on September 9th? A. On September 9th there were 25 passengers from Rome.

Q. Did you have any passengers from Spain? A. Yes; there were 12 passengers from Spain.

Q. Now do you recall whether you had any conversation with Mr. Burger while you were in Rome with respect to these 12 passengers in Spain? A. To my recollection, Burger did not want to take passengers in Spain but apparently later on he decided, if he did not have enough in Rome, to take passengers in Spain. That is my recollection.

Q. In other words, am I correct in stating that he said that if they had empty seats they would take Spanish passengers who were paying in pesetas; is that correct? [457] A. That is correct.

Q. And did you so inform the agent in Spain? Did you so inform the agent in Spain? A. That I don't remember.

Q. I will show you a letter dated September 8, 1951, and ask you if it refreshes your recollection? A. Yes, that is the letter, yes.

Q. Does that refresh your recollection? A. Yes.

Q. You did so inform him? A. Yes, I informed him.

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[459] Q. Did Mr. Burger, while you were in Rome, Colonel Marcano, express himself as to whether he was enthusiastic or not enthusiastic as to the potential of the operation, the AVE operation? A. He was very enthusiastic about the AVE operation. As a matter of fact, he and all the people that were working with him, I mean the pilot and the navigator, everybody in the office, crew people, they were all very enthusiastic, talked about the traffic in Rome, traffic in northern Europe, and even prepared a memorandum for going into northern Europe.

Q. Now during the time that you were over there did you at Burger's direction sign an interline agreement with Alitalia? A. Yes, I did.

Q. Which provided for the interchange of passengers? A. Interchange of passengers in Lisbon.

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[474] *Recross examination by Mr. Nickerson:*

Q. I show you Defendant's Exhibit AR for identification. Is that the interline agreement with Alitalia that you signed? A. That is.

Q. Are you familiar with Mr. Burger's initials? A. This is Mr. Burger's initials; yes.

Q. And Defendant's Exhibit AS for identification, was that prepared by Mr. Burger and Mr. Van Boheman? A. This was prepared by Mr. Burger and Mr. Van Boheman, yes.

Q. Did you thereafter send a translation in Spanish of Defendant's Exhibit AS to the Ministry of Communications? A. The Ministry of Communications in Caracas, Yes.

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[475] Q. You testified that Mr. Burger talked with the Alitalia people. A. Yes.

Q. Did you and Mr. Burger jointly talk with the Alitalia people? A. I talked with the Alitalia people when we were going to sign the agreement.

Q. Yes. Now, did Mr. Burger explain to you the nature of the agreement that he wanted to make with Alitalia? A. He did explain it to me, yes.

Q. Did he explain to you that he thought it was better for the company— A. That was his—

Q. —to have one trip a week from northern Europe and one trip a week from Rome? A. And joining them in Lisbon.

Q. Joining them in Lisbon and exchange passengers? [476] A. And exchange passengers.

Q. Alitalia would then go to the southern part of South America? A. South America.

Q. And you would take passengers to Venezuela? A. Or the northern part of Europe. It was going to work that way.

Q. As far as South America was concerned you would take them to Caracas, Alitalia would take them to the southern part of South America, is that correct? A. That is correct.

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Mr. Nickerson: I am going to introduce [477] these two documents when Mr. Schoenwald has had a chance to see them.

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[480] *Recross examination by Mr. Nickerson:*

Q. Colonel, you have been a resident of Venezuela for some time, have you? A. Yes; all my life.

Q. And are you familiar with the Public Works [481] Program of Venezuela? A. Yes, I am.

Q. And as a member of the government you were familiar with that? A. Yes.

Q. Are you generally familiar with the immigration into Venezuela? A. Yes, I am.

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[485] ALEJO DE CERVERA, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

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[526] *Recross examination by Mr. Nickerson:*

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[528] Q. Could CAVE under the contract of August 8, 1950, hire personnel to perform certain functions for it in running its operation? A. Very difficult to say because mainly the contractor of personnel against the franchise has been transferred to United States OA, but at the same time—

Q. Go ahead, finish. A. At the same time CAVE has retained some rights of supervision and the proposition of personnel. I would say the right—

Q. Excuse me; I don't think you understood my question. I don't mean to cut you off. If you want to finish, go ahead. But I don't think you understood it.

Aside from the contract of July 25, 1951, leave that aside for the moment, could CAVE under the franchise, the contract with the federal executive dated August 8, 1950, hire personnel to perform any of its operational functions? Could it, for example, hire someone to sell tickets for it? A. Well, that is different. I was thinking of flying personnel. No, I don't think so.

Q. It could not hire an agent to sell tickets [529] for it? A. It is so particular a question that, really, the answer cannot be found here.

Q. Yes. Well, I am just asking you your opinion. Could they hire an agent to sell tickets for it; could CAVE hire such an agent? A. Honestly I can't say, but my guess is "No."

Q. Could they hire someone to establish a maintenance ase for them? A. Well, you can go, as well as I can go, rough the contractor.

Q. Could you answer the question to the best of your bility? Could they hire someone to establish a main- enance base or would they have to do all of their main- enance themselves? Under the franchise, the document ated August 8th. A. Under the franchise?

Q. Yes. A. I thought we were speaking of the second ontract.

Q. No. I am sorry. I am talking only of the franchise ated August 8, 1950. A. The franchise? Yes.

Q. Under what we have been referring to as the [530] ranchise, under that document could CAVE legally have ired someone to sell tickets for it? A. Yes.

Q. And could it have hired someone to establish a aintenance base? A. Yes.

Q. And do maintenance for it? A. Yes.

Q. Could it— A. We are under the assumption that he second contract is included for the moment.

Q. Yes. I am only talking of the contract dated August , 1950, which we are referring to as the franchise. Could t hire personnel— A. Yes.

Q. —to perform various functions? A. Yes, sir.

Q. Could it hire someone to train any of its personnel? . Yes.

Q. Could it hire someone to set up flying schedules for hem? A. Yes.

Q. Do you understand? [531] A. Yes.

* * *

[532] Q. Now, sir, in its operations in Rome, for xample, couldn't CAVE, under the contract of August

8, 1950, which we have been referring to as the franchise, hire a Roman company to establish a maintenance base for it? A. In Rome, I would say yes.

Q. And with respect to the training of Venezuelan personnel outside of Venezuela could CAVE under the franchise hire a non-Venezuelan company to perform that training, to give that training? A. It is still the same question. It is doubtful, because no rights and obligations included in [533] the franchise can be assigned. But I know what you mean, I know to which difference you are pointing out. It is a very subtle one.

Q. You have no firm opinion as to whether it could or it couldn't, then? Am I correct there? A. I would say the correct opinion is "No."

Q. But you are not sure? A. I am willing to admit that there are cases very difficult because we know—we all know the difference between, for instance, to hire a man to clean the window and to hire a company to send a man to clean the window. I know that difference. That is why I am trying to understand you and to follow you and to admit that there are possibilities. But the contract is very strict in its terms.

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[534] Q. You mean you could be tolerant as to matters which are not of major concern— A. And a broad.

Q. Whereas matters of major concern CAVE would have to retain the right to control? A. Yes, exactly.

[535] Is that right? A. Yes.

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[539] *Redirect examination by Mr. Schoenwald:*

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[540] Mr. Schoenwald: I don't want to take the time of the Court with this unless the Court

feels that there is some doubt on this question. If the Court has any doubt on this I would like to have the witness compare article by article of the contract between the parties, the contract with—

The Court: If you feel that it is necessary for your case, but I don't feel that I should be called upon to express any opinion. I suggest that you ask your witness to prepare it in memorandum form and then perhaps Mr. Nickerson would agree that if he were called [541] his testimony would be in that sense, and you can offer it as an exhibit in lieu of his testimony.

Q. Would you have time to be able to prepare an analysis before you leave for Europe of the franchise article by article compared with the contract and indicate its violation? A. Yes.

Mr. Schoenwald: Mr. Nickerson, would you take such a document?

Mr. Nickerson: Is your Honor suggesting that I should do it? I am hesitant to do so because I think the cross-examination is significant, he has shown so much doubt.

The Court: We are going to take an awfully long time with this witness.

Mr. Nickerson: I appreciate that. And if your Honor suggests that I do it, I will.

The Court: Do you expect to call an expert on Venezuelan law?

Mr. Nickerson: Yes.

The Court: It seems to me that your rights would be amply protected by asking your expert to make any appropriate comments with respect to that very matter.

[542] Mr. Nickerson: I will accede to your Honor's suggestion.

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ALBERT W. GOTCH, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

[543] *Direct examination by Mr. Nickerson:*

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[548] Q. Now, Mr. Gotch, can you give us from your experience any opinion as to whether there is a developmental period after an operation shuts down for several months?

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A. Yes. It happens invariably. I think we have analogies in this country. There have been a number of strikes of some duration on some of the major [549] air carriers, for example, during which time much of their normal traffic deserted them and went to other carriers or didn't move at all. And we know from examining the traffic and economic results of those carriers after service was reinstated that it took them some period of time, perhaps a month or two, before they recovered to their prior position. The traffic had to be recaptured. And I think that is characteristic of any operation of this kind, a public service function, where service is suspended or shut down and the market be redeveloped.

Q. Now, Mr. Gotch, on pages 16 and 17 you made a forecast as to prospective traffic revenues. Could you tell us whether in making your forecast you base that in any part on the gross operating revenues for 1950, the net operating income for the year 1950, or the profit of 1950?

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[550] A. No, we did not base our projections on the full calendar year results.

Q. What did you base it on? A. We base them on the seven months to which we have earlier referred. That is clearly stated on the bottom of page 16: "factors experienced during the seven months of 1950 have been applied throughout."

Q. In your experience of schedule operations, Mr. Gotch, could you tell us what the average loads are of a schedule operation over a year's time in order to make money? A. Yes. Among airlines as of today and as of the past few years the so-called break-even load factor, which is in effect a traffic load producing revenues to offset the precise costs of carrying that traffic, has ranged on the order of 55 to 60 per cent for most carriers. That means that between 55 and 60 per cent of the seats in all of the aircraft that they have operated over the year have been occupied.

Q. An average of that? A. An average. (Continuing) Have been occupied by paying passengers. Over 60 per cent they begin to make some money; and within the range 60 [551] to 70 per cent there is an opportunity to make a fair and reasonable return on investment. A rule of thumb figure for an air carrier at which he can make a reasonable return on his investment and at which load factor the public gets a good quality of service, in other words, there are usually sufficient seats to go around, produces a figure of about 66 to 67 per cent. In other words, two out of three seats filled would usually pay the operator a return on his investment and will give the public a quality of service that is acceptable.

Q. Now what is the highest load factor that a schedule operation reaches? A. Well, on individual flights they sometimes reach—

Q. No. I mean an average over the year. A. Well, it varies. Some of the carriers have been getting up to about 70 per cent on some of their operations. During the war, as we know, when we had priority traffic, it went into the high 80 per cent. But, of course, public service fell apart, as we all know. And immediately after the war that same condition prevailed; there was a large demand and there was an inadequate supply, and as a result the public got quite dissatisfied and abandoned airlines [552] as a matter of fact to a great extent; traffic fell off, and for several years the entire industry was in financial difficulty as a result of that.

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[553] Q. Does any carrier, Mr. Gotch, reach a 100 per cent load factor?

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A. No.

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[561] Mr. Nickerson: Your Honor, I was reminded by one of my associates that I made a misstatement to your Honor yesterday, which I would like to correct, when I said that I did not think that certain documents would be in issue. I was thinking of the franchise and actually those related to the rights. And I did know that they were going to be in issue.

The Court: Very well.

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[573] *Redirect examination by Mr. Nickerson:*

Q. Would you take a look at the report, Mr. Gotch, page 3, paragraph numbered 6. If I may: "As soon as AVE can establish schedule dependability, a satisfactory standard of passenger service, and conduct an aggressive promotional campaign, it should attain a 40 per cent passenger load factor on eastbound [574] flights and an 82 per cent load factor on westbound flights, on the basis of two schedules per week with a 50-passenger airplane."

Can you tell us from your experience why you considered schedule dependability, a satisfactory standard of passenger service and an aggressive promotional campaign necessary to attain those load factors?

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A. Well, there are essentially two kinds of common carriage in the airline field; one is the so-called [575] scheduled, which is the normal certificated carrier, and the other is non-scheduled, which has been characterized as irregular carriage.

Schedule carriers must, under their certificates, perform a schedule operation; they must post their schedules and they must make every endeavor to adhere to them. They have to fly whether they have traffic or not.

That is not the case with non-scheduled carriers who do not have to adhere to fixed schedule; they may wait until they accumulate essentially a full load, a profitable load. It could take a day, it might even take a week, depending on circumstances. So that over the long pull they can attain a fairly high and profitable load factor. Whereas the schedule carriers are unable to do that because they must fly whether there is traffic or not. And

if they attain a 60 to 70 per cent load factor they consider they are doing quite well.

Mr. Nickerson: That is all.

The Court: This was to be a schedule type operation, was it not?

The Witness: Yes, sir.

The Court: And what do you mean by the [576] phrase "schedule dependability"?

The Witness: That means that they adhere to schedules fairly closely. Adherence to schedule is usually understood to be somewhere on the order of not more than 45 minutes late.

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[582] DANIEL C. COX, JR., called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

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Direct examination by Mr. Schoenwald:

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[603] Q. You were just telling us whether or not that plane was ever taken out of the company's control by Mr. Webb and Mr. Clemett.

Mr. Nickerson: Just to protect the interests of my client for the record, your Honor, may I object to all of this on the ground that Webb, it has been testified, was their employee, that this was long, long after the event and hasn't any possibly relevancy to the action.

The Court: Yes. Your objection is noted and you will reserve the right to strike, and I will overrule the objection for the time being.

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[610] Mr. Schoenwald: I read from the deposition of Mr. Fremont Burger.

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[615] Mr. Schoenwald: No. 242 is the exhibit number of the tape recording.

Mr. Nickerson: I object to it, your Honor. It is a self-serving statement, report from one employee of United States OA to the other.

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[616] The Court: Well, a great deal of this is self-serving and opinion and conjecture, a prediction of the future states of mind and other matters which would not be testified to even if Mr. Burger were here. And I have grave doubt as to the value of this as a matter of proof just from the standpoint of its probative value—

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[617] The Court: I am not sure that I can consider it a communication within the terms of the shop book rule, because there are always collateral indicia which are necessary to establish the procedure or routine by which the communications are made. The postmark, for instance, the filing indications, perforations, and collateral documents of various kinds, all of which fit into a business system which show that they were sent in the regular course of the company's business and that it was the regular course of the company's business to keep such communications.

Now this is a very unusual procedure of a man making a recording of his own voice and then sending a record of that voice to somebody else. And it could open the shop book rule for a great deal of mischief I am afraid if a thing like this could be considered to be admissible as evidence in the case.

Mr. Schoenwald: Would your Honor perhaps be of a different view if we presented the covering letter with which it was sent and the envelope, if we can find it?

The Court: I might, yes.

Mr. Schoenwald: As well as some testimony perhaps by the person who opened the envelope? [618] That might mean recalling the—it might mean production of a witness who is in California who was the one at that time who opened and received the mail. I am wondering if Mr. Nickerson—

Mr. Nickerson: I won't put him to any such technicality as that.

The Court: If you will concede that this recording was sent by letter by one employee of this company to another in the regular course of their business and that it was the regular course of their business to keep a record of this conversation, I will admit it within the shop book rule, reserving, however, the right to consider only those portions which I think would be admissible as a matter of primary evidence because, obviously, somebody's feeling about the state of mind of somebody else would not be admissible.

Mr. Nickerson: I am afraid if I did that, your Honor, that under the shop book rule, Federal shop book rule, the fact that it contains hearsay does not make it inadmissible; it merely goes to the weight of it. That is my recollection of the statute.

The Court: That is so with respect to hearsay.

Mr. Nickerson: Yes. There are conclusions [619] also.

The Court: There are conclusions and there are statements here which go way beyond the restrictions about hearsay.

Mr. Nickerson: I don't want to put him to any technical burden that someone mailed it. I will concede that it was mailed over here. But I don't want to concede that it was the regular course of business, because this was extraordinary.

The Court: Would you concede that if he called this witness from California the witness would testify, in substance, that it was sent by mail and received by the company as part of its regular business, that it was part of the company's regular business to keep the communication?

Mr. Nickerson: Yes.

The Court: And that this communication was kept?

Mr. Nickerson: That it was kept there, but not —I won't agree that it was made in the regular course of business, but I would agree that it was received and kept in the regular course of business.

The Court: And that he would so testify.

Mr. Nickerson: And that he would so testify.

[620] The Court: Well, I think that that would

be a sufficient foundation now. I will note your objection to its receipt and give you the right to move to strike out later, and I will have it marked in evidence.

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(Plaintiff's Exhibit 242 for identification received in evidence.)

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[626] Mr. Schoenwald:

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[627] If your Honor please, we are having a little difficulty finding some of the material that we would like to read into the examination, and I think it would serve the function of this court and the interest of justice if we could read some of this material in when we have had an opportunity to put our hands on it. There are some sections that I know exist and my associate has been unable to find them; and I can't see how justice would be served by insisting that we sit here and delay while I look for these sections.

The Court: Well, could you go ahead with the case and reserve the right to move until he reads them in, Mr. Nickerson?

Mr. Nickerson: Yes.

The Court: I don't know when we are ever going to get through, but we are always interested [628] that substantial justice is done.

Mr. Nickerson: All right. I will accede to your Honor's suggestion. I will call Mr. Russell.

JOHN S. RUSSELL, JR., called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Nickerson:

* * *

[629] Q. Yes. A. The meeting was to discuss the means of making an agreement between USOA and AVE work.

* * *

Q. Hold Defendant's Exhibit N before you (handing). A. There was discussion as to the reasons why USOA had ceased to fly its aircraft. I directed the attention of it was, I believe, Mr. Jones and Mr. Cox to the existence of Defendant's Exhibit N and stated that [630] this was a binding agreement and wanted to know why the USOA was not performing.

Mr. Cox stated that they were not going to perform unless they had full loads.

Mr. Jones stated that the agreement was no good; the only way to make it work was to tear it up and start all over again.

I told Mr. Jones and Mr. Cox that I thought the agreement was good and that we were here to see whether we could work within the framework of the agreement and we had no intention of tearing it up and starting all over agajn.

There was considerable discussion about the fact that Mr. Cox's airplanes or USOA's airplanes were not getting enough passengers. Mr.—

Q. Did Mr. Burger say anything at this meeting? A. Mr. Burger did. Mr. Burger said on many occasions—it was a rather lengthy meeting, it was in two sessions—

that the problem was not one that was basic to the agreement but one that was temporary.

I recall asking Mr. Burger specifically what was necessary to develop the business.

He responded that the problem was lack of promotion.

[631] We had quite a bit of discussion as to what was necessary to promote. And he concluded—or he stated that about $60,000 of developmental expense was needed.

That was about the substance of the morning meeting. There was a lot of other discussion going to matters that usually go on in meetings of airline people.

Q. Did Mr. Burger express himself at that morning meeting as to whether he was enthusiastic or not enthusiastic as to the potential of the operation? A. Mr. Burger at all times during that morning and later was extremely enthusiastic about the opportunities of this route.

* * *

[632] A. We reconvened about two o'clock.

* * *

[634] I then brought up a second point. There was an aircraft scheduled to leave Rome that night. I asked Mr. Cox whether that flight was going to go out on schedule.

Mr. Cox said, "You will have to get that from Mr. Jones."

I asked Mr. Jones the same question. And Mr. Jones said, "It will go out."

And I believe that is all of the substance of that meeting.

* * *

[635] Q. Will you briefly describe how you happened to call Mr. Cox or he called you and what in substance

both of you said? A. I had a call from Mr. Marshall about—

Q. Don't tell us what Mr. Marshall said. A. As a result of that call I first tried to call Mr. Dougherty but not reaching him I called Mr. Cox.

Q. This was Sunday, the 16th? A. This was Sunday morning, the 16th. I asked Mr. Cox—strike that.

I told Mr. Cox that I had been informed that the aircraft that was scheduled to have left Rome for Caracas had not in fact left Rome for Caracas but had been pulled off the route and had been taken into Germany that night. I asked Mr. Cox whether that was true. He admitted that it was true.

I told him that I had heard that he had stranded 14 or 15 passengers. And I asked him whether that was true. He made some remarks about the passengers. I believe—no; excuse me. He said, "I told you yesterday we don't fly until we have enough passengers or full loads." I don't recall what he said in that particular point.

I then said, "Well, what about our agreement of [636] yesterday?"

Q. Did he say anything about passengers in Spain? A. Yes, he did. He said that eight of the passengers I believe were from Spain and that they only paid in pesetas and he didn't have any desire to take passengers out of Spain if they paid in pesetas.

I asked him about the agreement of yesterday and what effect this had on the agreement.

I think he then told me that he was not going to speak to me but I should speak to his lawyer.

I told him that I thought this was a very important matter and that I was frankly very shocked.

Q. Did you tell him you tried to get hold of his lawyer? A. Yes, I did. And that I was going to do everything I could do to protect my client's interest if that was the way he was going to act.

Q. Now subsequent to that time, Mr. Russell, did you at the request of either Colonel Marcano or Mr. Marshall make any investigation into the market for DC-4s? A. Yes, I did.

Q. And did you speak to anyone relative to [637] purchasing any DC-4? A. Yes, I did.

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[638] Q. Now, will you first give us the approximate date of this conversation? A. Well, it was right after the weekend. It would be Monday, the 17th.

Q. Will you tell us what was said, in substance? A. I telephoned the president of U.S. Airlines, a certificated cargo carrier that operated in the eastern part of the United States, a man by the name of James Wooten. I told him the background, the purpose of my call, and that AVE had an option to purchase two aircraft and if we could exercise the option would he purchase the aircraft. He agreed that if we could get title to the aircraft he would purchase them for [639] $600,000 apiece.

Mr. Nickerson: Your witness.

Cross-examination by Mr. Schoenwald:

Q. Is this Mr. James Wooten the same James Wooten who was declared a bankrupt and who was subsequently imprisoned for embezzling trust funds in connection with the U.S. Airlines? A. I have no information on that. I would be very much surprised if he was.

Q. The U.S. Airlines is defunct now, isn't it? A. I don't know whether it is defunct. It doesn't operate.

Q. But it is bankrupt, isn't it? A. A petition in bankruptcy was filed, but after Mr. Wooten left the presidency.

Q. You are familiar with the facts. It was bankrupt at that time, wasn't it? A. I am familiar with the facts. And it was very much not bankrupt at that time.

Q. Mr. Wooten, as a matter of fact, had sold one of the airplanes that the Colonel operated with just prior to the interest of USOA in this company for $220,000 hadn't he? A. I don't know.

[640] Q. Mr. Wooten was president of Near East Airlines, was he? A. Yes, he was.

Q. You knew that Near East sold an airplane to the Colonel for 220,000 about nine months before? A. No, I don't, as a matter of fact. I am perfectly willing to take your statement that that is so.

Q. Did Colonel Marcano tell you or did Mr. Marshall tell you that he had heard a conversation between Mr. Burger and Mr. Webb in which they were planning to take the bill of sale out of the safe of USOA relating to the airplane that was involved in this operation?

Mr. Nickerson: Can you fix the time?

Q. Well, shortly before or during the progress of the conference, did it not come to your attention that the Colonel had heard a conversation between Mr. Burger and Mr. Webb with respect to taking the bill of sale out of the safe? Either from Mr. Marshall — A. I have of course heard it, Mr. Schoenwald, but, I can't place it in my mind whether I heard it as part of the preparation of this case or whether I actually did hear it prior to

September 15th meeting. My recollection is that I did not.

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[644] Q. Now did you know whether or not Mr. Wooten had a million dollars in cash free and clear and available to pay for this airplane at the time he spoke about buying it? A. Mr. Wooten had to my knowledge just become president of U. S. Airlines with an entire new group of backers. Because of other professional arrangements I knew that the group of backers were people of very substantial means and I believe that they had the money.

Q. Mr. Wooten is a regular client of yours, isn't he? A. Mr. Wooten has never been a client of ours.

Q. He hasn't been a client of your firm? A. Never.

Q. He is a regular visitor to your office, isn't he? A. I don't think Mr. Wooten has been in our office a half a dozen times in the last ten years.

Q. You have participated in the recent insolvency proceeding, haven't you? [645] A. I don't know that Mr. Wooten has ever been through an insolvency proceeding.

Q. The U. S. Airlines recent insolvency proceeding. A. No, we didn't—oh, I beg your pardon. We may have represented a few claims that were filed, yes.

Q. Didn't you also participate in the preparation of the lawsuit of Near East Transport, Mr. Wooten's firm, against Colonel Marcano? A. No; we represented Colonel Marcano.

Q. You participated in the settlement, didn't you? A. Yes, on behalf of Colonel Marcano.

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[647] JOHN PAGE MARSHALL, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Nickerson:

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[649] Q. Now prior to the printing of Plaintiff's Exhibit 357, the study of Gotch & Crawford, did you have any communications from USOA? A. I did.

Q. Will you tell us the substance of those and who spoke to you? A. On or about June 12th I received a telephone call from a Captain Bush—I don't know what his relationship with USOA was—and he asked me—

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[654] Q. All right. Then will you tell us what happened after that, what was said and who said it? A. After that, after they had finished I think the next discussion was actually from me when I said, "Now we want to know the basic requirements for the establishment of this service. The equipment requirement is for two DC-4s. We also—we will have to be [655] adequately prepared organizationally speaking." I recall my comment as having been, "Gentlemen, your operation to this time has been unlike the operation that we are now discussing. You have been engaged in an irregular operation, whereas this is a schedule operation. There will be capital required to develop the traffic to recaptivate the operation." Capital—I told them on the order of 200,000 in my unqualified judgment or my guess was that they—that I wasn't prepared to spell out exactly what the 200,000 would be required for. There was a query to that when I said 200,000. I told them I didn't know exactly how

it would be allocated but that it would be a conservative amount of money. I told him that they would have to equip their operation with personnel, and I mentioned specifically traffic personnel.

The Court: What kind?

The Witness: Traffic, sir.

Q. What are traffic personnel? A. That would be people who are trained and competent in the development of traffic for a schedule common carrier operation.

Q. Development of accounts? [656] A. That is correct. Specifically, what I had in mind —

Q. Don't tell us what you had in mind. Just say what you said to them and what they said to you. A. I am sorry. They advised that they had five DC-4s and three DC-3s in response to my statement that they would need two DC-4s. I made some query at that point as to the present equipment of the aircraft, whether they were equipped with seats or were being used for cargo operations, and they advised that they had some of each, as I recall it; in any event, that they had passenger equipped DC-4s.

When we discussed the financial requirement I asked if they thought that that was available to them, and he—Mr. Cox said, "We have, as we have told you, five DC-4s and three DC-3s. We are paying our bills." And he laughed.

He said, as to the traffic—discussing the traffic situation mention was made of the fact that he had already some preliminary communication with Mr. McDonell; I believe he said he was then employed and had been for some 17 years by American Airlines in traffic, in public relations work.

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[658] Q. Did you say whether or not you had been over the AVE route? A. I specifically told them before we went into, very early in the discussion that I had never been to Venezuela, and I had not been associated with Colonel Marcano at the time that AVE was in active operation previously and that the only information that I had was contained in the report.

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[658-A] Q. Did you or did you not at that meeting make any suggestion to USOA as to what proposal they should make to you? A. There was discussion on that. Burger said—

[659] Q. Will you tell us in substance and briefly what that was. A. Burger said, "What have you in mind," as to the form of the deal, I think the expression was.

My answer, in substance, was that the report, Gotch & Crawford study, the last two pages of that contained a suggested partial outline which they could accept as indicating our thinking, but that it was not binding, that actually the matter of entering into a contract for this operation, their approach to that, it was a competitive thing, that we had circularized the operating industry with the reports, the Gotch & Crawford study, and I thought the best approach for us was to let each interested party submit their proposal, drawn in any fashion they wished, and that we would then consider them and take that which was most advantageous to us.

Q. Did you thereafter receive Defendant's Exhibit G?

Mr. Nickerson: That is the letter, your Honor, of July 19th.

A. I did.

Q. Was any part of that dictated by you or suggested by you to USOA? [660] A. Paragraph two may have been. It is only one sentence, if I may read it.

Q. That is the one that refers to U. S. registered aircraft under lease to AVE. A. Then I would not have suggested that. That wasn't mine. I am sorry. I did not suggest that.

Mr. Burger made some inquiry as to the matter of whether American crews could be used, and I told him that I thought that Venezuela—they required Venezuelan crews after a time. So I may have suggested point five.

Q. Yes. What I am getting at is did you suggest the substance of what is in the July 19th proposal or was that something that was suggested by USOA independently of you? A. I did not suggest this outline.

Q. Was that delivered to you by hand or by mail, if you recall? A. It was delivered to me by hand.

Q. Who delivered it? A. Mr. McCormick and Mr. Burger.

Q. Did you have discussions with them at that time? A. Of a limited nature.

[661] Q. Did you thereafter study the July 19th proposal? A. I did.

Q. Did you then call Mr. Cox? A. I did.

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[667] A. May I correct a misstatement that I have made pertaining to a date?

The Court: Yes.

A. I have stated, I think, that reference to the specific date for starting this operation did not occur at the first meeting. I was in error. The reference to the date did

occur at the meeting but not at the point in the discussion we were in a while ago. It did occur at the first meeting.

Q. Tell us in substance what was said about that, briefly. A. At the very end of the meeting as they were leaving, we got back to the matter of the urgency of reactivating the operation, and I asked Mr. Cox when he could start the operation if a contract was entered into with him.

He said—well, we talked about that quite a bit, and it was realized that it was a matter of weeks rather than months, and he said, "Well, possibly by August 10th and certainly by August 12th."

Q. All right. Going back to the July 25th meeting when you showed them— A. May I add one thing to that?

[668] Q. Yes. A. I questioned Mr. Cox on whether that was too short a time and explained to him that if a date was established to start this operation and that we then failed to do so, that we would, in all likelihood, be in very serious difficulty with the Venezuelan authorities, since they perhaps were extending themselves to allow us a chance to get it reactivated under any circumstances and that we would have to advertise this thing to reactivate the service and that we would have to abide by whatever date we notified them that service would be started and that we would advertise the thing.

Mr. Cox said, "Well, Mr. Marshall, it has been our business to conduct operations all over the world on short notice."

Q. Going back to the July 25th meeting when you presented Defendant's Exhibit M to USOA personally, was there any discussion of any change in that draft, and examine Defendant's Exhibit N, if you care to, which is

the final contract. A. These are changes from the second draft to the so-called final draft?

Q. Yes. [669] A. At paragraph (f).

Q. 1(f)? A. 1(f). I am sorry.

Q. Yes? A. There was a change in that the draft provided that USOA was to pay CAVE $1,500 per roundtrip flown with a minimum guarantee of $3,000 per week.

Mr. Cox said that that seemed perhaps a little rough on them, since it would take time to get the operation started again, that there might not be occasion for two operations, that this, as he read it, would obligate them to pay a minimum of $3,000 a week from the very beginning, and that he thought that that should be relaxed to recognize a period for reestablishment of the operation, during which perhaps only one plane would be required and that in any event he could not send a second airplane down immediately.

Accordingly, the contract was written to provide—to remove the guarantee of $3,000 per week for a period of 60 days.

Q. So that it would start after 60 days, $3,000? A. That's correct.

The Court: And there would be nothing in the meantime?

[670] The Witness: Yes, sir. In the meantime they would pay $1,500 per roundtrip actually flown.

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[674] The Court: Before answering that, will you please indicate what the words were that were added as a result of Mr. Cox's objection.

Mr. Nickerson: "As defined in this agreement."

The Court: Let Mr. Marshall answer that.

The Witness: The words "as defined in this agreement" were added, and I agreed with Mr. Cox's question to me as to whether in my opinion that would mean that the term of the contract, being for one year, would be included in the "as defined in this agreement" and that accordingly the action would be not binding after the term of a year.

Mr. Schoenwald: With respect to what this witness said, "that would mean," I request that it be stricken.

The Court: I take it that you are referring to a conversation which took place with Mr. Cox—

[675] The Witness: Yes, sir.

The Court: —immediately before this form of words was adopted.

The Witness: That is right.

The Court: I will take it.

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[677] Q. In the discussions that you have referred to in your testimony with the USOA personnel, did they at any time make any statement that they would fly only if they got full loads? A. Absolutely not.

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[678] Q. Will you refer, Mr. Marshall, to certain meetings which you have testified to that took place in the middle of September 1951.

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[681] Q. Can you tell us the substance of that meeting, who was there and what was said? A. I neglected one thing, if I may, in the first meeting. At that meeting Mr. Burger was present and he had some considerable volume of paper, large sheets, and textual material, and

he endeavored to preva.. upon Mr. Cox to consider the requirement for [682] conducting the schedule operation.

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[693] *Cross-examination by Mr. Schoenwald:*

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[708] The Court: Mr. Schoenwald, I am afraid that you are taking a little bit of the attitude of an attorney for an infant suing a trustee, and you are not in that protected position here. You are representing a businessman trying to make money, who was dealing at arm's length with another businessman, who was also trying to make money, and you have got to understand the issues of this case in that light.

Now I do not regard your argument as having any validity because I think that you relied upon several things, not only what was in the so-called prospectus, but upon the investigations made by your own clients upon what they considered to be the weight to be attached to various intangibles and illusive considerations. The future business, for instance. Nobody can predict with certainty what is going to [709] happen in the future on anything, let alone transportation of passengers. And the manner in which you are attempting to explore everything that should have been told to your client, leads me to believe that you are laboring under the illusion that your client was in the nature of a ward or an infant, and that people with whom your client was dealing were like trustees or fiduciaries —in fact, you have made the allegation that they had a fiduciary duty which they breached.

Mr. Schoenwald: After the contract.

The Court: I am unable to understand what that is so far. I don't see what the basis for it is in this case. I see one reference in a letter to the term "partner," which I don't think is sufficient to enable you to make that argument. But up to this point you are not entitled to take or to claim the right to pursue your adversary as though they had the duty of a trustee toward a ward. They are two businessmen dealing at arm's length, that is what they were, and they entered into the contract, a contract which I have no hesitancy in saying was loosely drawn and which had all kinds of safeguards and provisions which might have been put into it which [710] were not, and there were all kinds of things about this prospectus, in my opinion, which indicated that this company was stumbling and faltering, if not in a condition of very serious financial difficulty, and in that atmosphere I don't understand how you can pursue this.

Mr. Schoenwald: Your Honor, I think this is a question that relates to the remainder of the testimony, and it is of some importance.

The Court: Well, put a question. I will give you an opportunity to argue the law and to summarize the evidence later. Put a proper question. I have been trying to help you and guide you along constructive lines in giving you the benefit of what I thought were tentative views, and I can deal with it better if you will put a fresh question and we will go on from there, because I think your important task now is to get the testimony and the proof complete.

* * *

[734] *Redirect examination by Mr. Nickerson:*

Q. Mr. Marshall, you testified with respect to a meeting of yourself, Colonel Marcano, Mr. Burger and Mr. Webb. Can you tell us in substance what was said in that conversation? I believe you testified it was sometime in September, prior to the time you saw Mr. Cox. A. Yes, sir. It was on the morning of September 14th that I went to the Lexington Hotel at approximately ten o'clock in the morning and met with Colonel Marcano and Mr. Burger, who were having breakfast. Colonel Marcano mentioned that there were some very strange things going on and that USOA was endeavoring to take their airplane out of AVE's operation, and he [735] suggested that Mr. Webb was coming there and that we go up to their room and discuss the matter, and Mr. Webb did come and he told me the first complete detail on the thing, which was that Mr. Cox had sent him, Mr. Webb, to Caracas—

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Mr. Schoenwald: I think what the witness is testifying to is not what our man said but what Colonel Marcano said our man said.

The Witness: No.

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[736] Q. Don't tell us of any conversation you had alone with Colonel Marcano. Tell us only of the conversation you held when Burger, Webb and Colonel Marcano were present. A. Yes.

Q. Continue your answer, will you. A. As I say, Mr. Webb said that he had been sent to Caracas by Ralph Cox to take the airplane to Bermuda on the next eastbound trip, to get the transfer—to transfer the pas-

sengers if possible to BOAC, but in any event to return the airplane to the United States.

He said that upon his arrival in Caracas that he had been approached by Mr. Burger and Mr. Burger met the airplane when he came in and that he had disclosed to Mr. Burger his instructions, that Mr. Burger had prevailed upon him not to do so and that Mr. Burger and himself, Webb, had then made an arrangement with the pilot of the aircraft, whose name was Campas, to not move the aircraft for any purpose except under instructions accompanied by the word "Burweb" a code word—I am sorry, should not have used it—at that time I didn't learn that it was Burweb, until later.

[737] Mr. Webb then said that he was very tired; that he had been down to Wildwood and that—he laid down on the bed and said that he wanted to talk over the operation. He said, "I think we can take over this operation." He said, "I own half of that airplane—I mean, I own 25 percent of it and Clemett owns 25 percent." He said, "Cox has transferred the airplane to USOA without leaving us any evidence of our ownership. It is now, according to registry, owned by USOA."

Then he said, "I think that we can get that airplane." He said, "I have a friend of mine in Florida who has a DC-4 and who is a very close friend, he has offered to make available to me up to forty thousand so that I will have two aircraft and capital to undertake AVE's operation."

Well, Colonel Marcano said no, that we wouldn't entertain consideration or not enter into a discussion or consideration of the operation of AVE by anyone else. Then I mentioned—

Q. Anyone else other than who? A. Well, he may have said USOA. I stressed the fact that of course we had an agreement with USOA and that our whole effort would be to make that work [738] and that we wouldn't talk to anybody until that was definitely out of the picture, and I suggested that Mr. Burger return—Mr. Burger and Mr. Webb return to Mr. Cox's office—they told me that they had been in touch with him—and determine what Mr. Cox's plans were, and that Colonel Marcano and I would remain there until we received word from them. We did receive word not less than a hour later, and Mr. Cox was ready to talk to us.

Mr. Nickerson: That is all, your Honor.

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[781] Mr. Nickerson: Would your Honor want me to read in some questions from Burger's deposition before lunch? It may be fairly rapid.

The Court: Yes.

Mr. Nickerson: Page 5.

"Q. What, in substance, were the discussions that you had?"

And may the record show and counsel concede that that was discussion between Burger, Cox and Waters.

"A. Mr. Cox evinced an interest in it. We had a chap in our employ, Dave Waters, who had been formerly with AVE and we asked him a lot of questions about their previous operation, potentiality and the possibility of our participating in such an operation. The discussion was very general at this time.

"Q. As a result of those discussions, did Mr. Cox [782] become interested in it or had he been interested before?

A. I think that his interest was a result of those discussions, by and large. I don't think that he was acquainted with the situation too much before.

"Q. Did he participate in the discussions with Waters and by 'he' I mean Cox? A. Yes, to some extent. Principally, I asked Waters mostly about the AVE operation, what transpired before.

"Q. Can you tell us the substance of what Waters said about it? A. He said that in his opinion he thought there was a good potentiality there, that they had never realized it before. He said that they, operationally and business procurementwise and all of those things—it hadn't been a good operation, and he mentioned a lot of the personalities that were in the deal; who they were I don't know, I don't remember the names. There seemed to be an arrangement between Wooten and Prescott and Colonel Marcano, and then there were certain involved situations among them. Those were the points that he brought out principally."

Page 7, second question:

[783] "Q. Could you tell us in substance what your discussion was?"

This refers to discussions between Mr. Cox and Mr. Burger prior to the time they saw Mr. Marshall.

"A. It would be very general at this point. We didn't know the people who were involved in it. We were merely under the supposition that it would be available. We were definitely interested in it. We wanted to determine on what basis if any we might get into such an arrangement."

Page 8, third from the last question:

"Q. When you received Plaintiffs' Exhibit 1,"—that your Honor, I will refer to as Plaintiff's Exhibit 357; it is the Gotch & Crawford study—"did you examine it? A. I didn't have an opportunity to. We were in an operation in the North Atlantic at that time, and I was pretty busy.

"Q. Did you ever get a chance to examine it? A. This was turned over to Mr. Cox principally. He was the one that looked it over.

"Q. Did you ever get a chance to examine it? A. Only superficially."

Page 40, the first question, and this refers [784-5] to a conversation with Colonel Marcano in Caracas:

"Q. Did he mention"—he meaning Colonel Marcano—"anything about the Rome office being involved in a dispute with Mr. Wooten? A. No—that came up, yes, there was a discussion about that.

"Q. What was that? A. Colonel Marcano said that after we had time to go to Rome and look at the Rome office and decide whether we should wish to keep it or not, we should let him know. But whether Jim Wooten was in the deal at that time was not discussed, I don't believe; at least not in my presence it wasn't.

"Q. What did you and Mr. Cox say to that? A. It was on the basis of let's look it over. He told us of some of the expenses that he had had in connection with the Rome office and we indicated that we felt that it was too much, that we didn't think we could handle that, but we would still look at that and advise him. That was one of my assignments."

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[786] WILLIAM C. WOLD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Nickerson:

Q. Mr. Wold, will you tell us what business you are in? A. I am a partner in an aircraft sales firm, transport aircraft sales firm.

Q. Will you tell us something of your background in aircraft sales? A. Well, I worked for Consolidated Vultee for a number of years. I worked for them about ten years; the last four was primarily in transport aircraft sales work.

Q. What years were those, about? A. That was up until April of 1949 when I started this present business that I am in.

Q. Where were you before you were with Consolidated Vultee? [787] A. Well, I was in the U. S. Signal Corps for a year, and before that I graduated from college.

Q. Where did you go to college? A. M.I.T.

Q. What kind of degree did you get? A. Aeronautical.

Q. In your present business, what is the nature of that business? A. Transport aircraft sales. We are specialists in that field.

Q. Would you describe yourselves as brokers? A. Yes; we do primarily brokering and occasionally dealing ourselves.

Q. And in that connection were you familiar as of September 15, 1951, with the market price of DC-4 aircraft? A. Yes. That is part of our business.

Mr. Nickerson: May it be conceded that Defendant's Exhibit BB for identification represents the

time on the aircraft, the two aircraft involved, and the engines thereof?

Mr. Schoenwald: Yes.

Q. Now holding Defendant's Exhibit BB for identification and assuming that the two DC-4 aircraft [788] referred to therein, DC-4-E's, were in proper fitness for flight as of that time, can you give us an opinion as to the market price on that date, September 15, 1951? A. Yes. In my opinion aircraft such as that would have had a fair market value of between 600 and 625 thousand dollars.

Q. Could you tell us on what you base your opinion? A. Well, I base that on our records of aircraft sales and known sales of comparable transport aircraft.

Q. Did you have sales that you were aware of on or about that date? A. Yes. Sales that we were aware of and also sales that we actually made ourselves. I can give you some examples if you want.

Q. All right. Will you do that? A. In October 1951 we sold an aircraft ourselves. The actual—

Q. DC-4? A. DC-4, yes.

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[789] Q. What was the price? A. Well, the actual price of the aircraft sold was $615,000. Now, the aircraft was not comparable to this aircraft, as far as its type of interior and so forth. Had it been, in my opinion it would have sold for about $660,000.

Q. You are assuming—I should have put that into the hypothetical question—a passenger interior recently renovated? A. Yes. In other words, every transport aircraft

sale is not of an aircraft that is identical to a previous sale or a future sale. There are variations between them.

But trying to compare the aircraft actually sold with the type of aircraft that you have in mind, in my opinion that would have sold for $660,000. That was in October 1951, an aircraft that we sold ourselves.

[790] Now in June of 1951, we did not make this sale but we know of this sale through our records, of a DC-4 to Pacific Northern Airlines; actual sales price of this aircraft was $500,000. In our opinion had it been comparable to this one it would have sold for about $525,000 to $530,000 in June 1951.

Now in October—

Q. Was the market going up? A. The market trend was rising sharply.

Q. Do you know what the reason for that was? A. Well, the reason, I think the international situation in the world had a lot to do with it, plus the fact that airline traffic was rising.

In October 1951, again, there were two aircraft sold, which were not our sales, and they were bought by Seaboard & Western Airline. And in my opinion had they been comparable to this aircraft they would have sold for between 645 and 650 thousand dollars.

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[791] The Court: How old were the two planes represented by Exhibit BB which you would sell in 1951?

Mr. Nickerson: I am not sure, but maybe the witness can tell us from the aircraft total [792] time.

The Witness: Well, you can't tell the age in time.

Q. You can only tell the extent of its use? A. You can tell the extent of its use, yes. And the total extent of the use of an aircraft and its chronological time has not, has not been over the past good many years, has not been the significance in its value in comparison with its time since overhaul and the supply and demand situation in the market, because we have sold DC-4s as high as $750,000 after they had been completely written off on the owner's books, and the original aircraft cost about $300,000. We did that in the case of National Airlines DC-4s.

Q. In what year? A. That was in, I think that was in 1952.

Q. Was that due largely to the Korean War situation? A. There is no question that that had an effect on the market situation. But airline traffic has been growing steadily all during that period, which also had its effect.

Q. What is the significance of the initial [793] "E" next to "DC-4"? A. The "E" is a model designation. It designates a later model according to the Army and/or the Air Force and Douglas dimensions, and it also indicates the type fuel system. For example, DC-4-B was originally built only with a 2800-gallon fuel system. DC-4-E model had a 3600-gallon fuel system.

Q. When did DC-4-Es become obsolete, if they were? A. They are a long ways from obsolete today, sir. They are selling now for pretty close to $700,000 range.

Q. You say they are selling now for $700,000. Does that mean new, delivered by the manufacturer? A. No, sir. They are not in manufacture, and they have not been in manufacture since—I think the last ones were manufactured in '46. We are talking entirely about used aircraft.

Q. How do you determine the obsolescence of an aircraft? A. Well, obsolescence of course is created every time a new model comes out. In other words, the DC-4 became relatively obsolescent when the DC-6 model came out, which was pressurized; the [794] DC-4 is not pressurized. But it doesn't become obsolete from the standpoint of being a good serviceable useful money-making airplane for the airline as long as the traffic, the airline traffic, creating demand for that aircraft is increasing at a greater rate than new aircraft are being produced. And that is the situation we have had in this industry for the last five or six or seven years.

Q. Then on that basis the DC-3 would not be obsolete today, would it? A. Not by a long shot.

Q. The DC-3 has not been manufactured for many years? A. You are absolutely right; and the DC-3 sells today for more than it sold new.

Q. Would it be your testimony that a DC-3 is not obsolete today? A. Not by a long shot.

Q. You say it is not obsolete? A. I mean that it is nowheres near obsolete.

Q. In other words any airplane which is commercially exploitable in your opinion is not obsolete? A. That is right. You would have to get into [795] a very careful definition of what you mean by "obsolete." If you mean as a vehicle for carrying passengers and performing airline service and making money, it is nowheres near obsolete.

Q. Well, let me put this final question to you: I take it you would not agree that the cessation of manufacture of a model is tantamount to the beginning of its obsolescent period? A. I am afraid, to be absolutely honest

with you, Judge, I would have to have an expanded definition of what you mean by "obsolete."

Q. I am suggesting that if an airplane model is no longer manufactured by its manufacturer and the manufacturer ceases definitely and irrevocably the manufacture of that model, to the extent of pulling out any of the special machinery used, taking it off its drafting board so that there is no longer any equipment or machinery for the purpose of manufacturing, I am suggesting that that, ipso facto, creates a condition of obsolescence for that airplane? A. Well, I will answer that by saying that it does only relatively.

Q. All right. I get the point. A. Because actually if the manufacturers [796] have not been producing or did not foresee a traffic growth which was going to create a supply and demand situation for those aircraft after he stopped manufacturing them, that would bring their business way up, far above, what he was selling them for. It simply means I think that the manufacturer felt that it was obsolete too soon.

Q. Was there a very lively market in 1951, September, October, 1951, for used DC-4s? A. Well, I would hate to use the word "lively" because—

Q. Active, reasonably active. A. It was a reasonably active market. In our industry the numbers are pretty small and the movement of aircraft is not so frequent that you can refer to it like you do the stock market activity. But it was increasing, and the pressure of demand was definitely beginning to show.

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[797] *Cross examination by Mr. Schoenwald:*

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[801] Q. I will ask you the next question: As a matter of fact, did you own those airplanes that sold for $415,000 each in October? A. That wasn't a sale that we made ourselves. I mean, that is a sale that is of record that we know of.

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[804] Mr. Nickerson: May I call on the plaintiff to produce the material that I previously asked them to produce, namely, the specifications with respect to the USOA aircraft, that I called on them for that about a week, more than a week ago?

While Mr. Pollak is finding that:

Redirect examination by Mr. Nickerson:

Q. Will you explain the difference between the $415,000 figure that you referred to and the $615,000 figure? [805] A. In the case of the Seaboard & Western Airline?

Q. Yes. A. Well, these records are at my office. But this is based on the fact that the aircraft were taken with a lot of equipment lacking, or things not done, which are ordinarily included or done by the seller which the purchaser was going to do which accounted for the reduced price. But for purposes of evaluation and comparison, had the seller done all those things and equipped the plane that way, why, then, the value would have been $640,000 to $650,000.

Q. What was the kind of equipment that wasn't on that? A. For example, if I remember correctly, on this aircraft the engines were not included. That is one thing. Engines would be about eighty thousand right there.

Q. Can you take a quick look at this and see whether—are you familiar with it enough to do it? A. Yes, I think so. This is the aircraft?

Q. This is what has been produced as the [806] detailed information about N-90436, which is one of the aircraft. A. Approved for return to service.

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Mr. Nickerson: I am continuing to read from Mr. Burger's deposition, your Honor. Page 52.

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[807] Mr. Nickerson: And it is referring to the Rome landing rights.

(Mr. Nickerson read from Mr. Fremont W. Burger's deposition as follows, beginning at page 52:)

"Q. When did you obtain those landing rights? A. We obtained them within approximately three days after my arrival there.

"Q. Approximately the 20th of August? A. I would say approximately, yes, sir."

Mr. Nickerson: Page 64. This also refers to when Mr. Burger was in Rome, if your Honor please.

"Q. And after the time that you saw Colonel Marcano talking to the Venezuelan Ambassador, did you receive friendlier treatment from the Venezuelan Embassy? A. After Colonel Marcano's arrival there, I had no further contact with the Venezuelan Embassy and any contacts that were made with those people [808] were either made by Mr. Cover, Colonel Marcano or Mazzolini.

"Q. Do you know whether those contacts were friendly after that time? A. I wasn't summoned to the Embassy any more nor were we bothered in any way by the Venezuelan authorities."

Page 75, second question:

"Q. What was Marcano doing during that time, do you know? A. In Rome?

"Q. Yes. A. We were together almost constantly.

"Q. He was working with you on the problems? A. He was working with us on the problems. We had developed this new route proposal. We discussed all phases and possibilities of this new route. We developed this operations brief. discussed our immediate needs, discussed what we wished to do in the future and we were together, as I say, practically all the time.

"Q. He was cooperating with you? A. Yes."

Page 100, third question:

"Q. Under Exhibit 99"—which, your Honor, now [809] is Defendant's Exhibit AS for identification; it is the so-called operations brie. that Burger and Van Boheman prepared over in Rome and which Colonel Marcano testified he translated and sent to the Venezuelan Ministry of Communications.

"Q. (Continuing) —could you tell us what you said to Colonel Marcano in that regard? A. I felt and told him —you are not interested in what I felt. I told him that I thought the potentiality was very, very great on this projected operation."

Page 101, first question:

Deposition from Mr. Fremont W. Burger

"Q. What did Colonel Marcano say with respect to your estimate?"

That refers to the estimate on the previous page as to potentiality from Rome.

"A. He seemed to be enthusiastic about it.

"Q. Were you enthusiastic about the operation yourself? A. Very."

Page 116. This refers, your Honor, to a meeting between Mr. Burger, Mr. Webb, and Colonel Marcano.

"Q. What was the conversation when Webb and [810] Colonel Marcano were present? A. The conversation was very general, about Rome and the possibilities and what was going on in general.

"Q. What, in substance, did you say and what did the others say? A. I don't remember, Mr. Nickerson. The conversation was most general.

"Q. In substance? A. In substance, we discussed the routes and the business and the possibilities and that sort of thing.

"Q. Did you say what you thought of the potential? A. Yes.

"Q. What did you say? A. I said I thought it was very good."

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[814] Mr. Nickerson:

"Q. Did Colonel Marcano offer to go to Lisbon to accomplish both those objectives? [815] A. Yes."

Page 290, the last question:

"Q. Isn't it true, Captain Burger, that you never found anything, at any time, which gave you any reason to suppose that Colonel Marcano was dishonest in any way? Isn't that the fact? A. I have stated it before, Mr. Nickerson, and I will state it again: I believed Colonel Marcano to be absolutely honest. I believed Colonel Marcano to be absolutely honest throughout my connection with the AVE operation.

"Q. Do you still believe that now? A. You have asked me for a personal opinion?

"Q. Yes."

Mr. Schoenwald: I am going to object.

Mr. Nickerson:

"A. I still believe that Colonel"—

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[817] WILLIAM C. WOLD resumed.

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Redirect examination continued by Mr. Nickerson:

Q. Have you examined, Mr. Wold, Defendant's Exhibits BY and BZ for identification? A. Yes, I have looked them over.

Q. And have you noticed that they speak as of 1953? A. Yes.

Q. And as of 1953, assuming the facts which are set forth in those exhibits existed as of September 15, 1951, would you say that your previous testimony would be affected if you made that assumption? A. Well, the only thing that I see in here, [818] looking it over, this, rather hastily, is that the aircraft show a gross weight of 71,800

pounds, which would indicate that they have the smaller engines, which are not consistent with the fact that they are the Model E. Usually, when the aircraft is converted, as these aircraft have been converted, from C-54-A to C-54-E they have the larger engines installed which allow the 73,000 pounds gross weight.

Q. Do these show that they are C-54-E? A. They show that they are C-54-E, which are ordinarily expected to be the 73,000-pound aircraft with 1450 horsepower engines. These aircraft are shown as having only 71,800 pounds gross weight, so, although I don't see the engines culled out in this report, I am assuming that they are 1350 rather than 1450 horsepower engines.

Q. Is that safe to assume from the gross weight? A. It is pretty much to be expected, yes.

Q. Now assuming that they have those smaller engines on them, what would you say the market price would be as of September 15? A. That might reduce the valuation as much as $50,000.

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[819] Q. Mr. Wold, does Defendant's Exhibit BB for identification show the type of engines? A. It just gives the engine time since overhaul and total time. It doesn't give the engine model type.

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Recross examination by Mr. Schoenwald:

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[821] Q. Assuming for the moment that the engines [822] were the R-2000 type and were available for 12,000 each, and four engines on these planes, I think that is

$48,000, can you tell us any other difference which would account for the $175,000 that you say that these planes were worth and what the other DC-4s sold for? A. Which airplanes are you referring to?

Q. I think you expressed the opinion that USOA airplanes were worth in September 1951—how much did you say they were? A. Between 600 and 625 thousand.

Q. You say you thought that the airplanes that we had were worth approximately 200,000 more than these airplanes that were sold for 415,000; isn't that right? A. That is right.

Q. And so far we have accounted for 48,000 of that difference, with aircraft engines, which leaves us with another $150,000 worth difference to be accounted for. How do you explain that difference? A. First off let me point out that the engines that apparently were on this airplane are not as valuable engines as I would assume that they [823] were. Now the Seaboard Airline aircraft were purchased. I think they were, pretty sure they were, used as cargo aircraft, which means that they would have no interior, other items of equipment—radio equipment and accessories furnished by the buyer rather than the seller. The engines in that particular case, I think the figures that I used were 20,000 apiece, which would be the DC-5 or -13 type engine.

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[824] Q. Now would you tell us, then, what items make up the other $150,000 worth of difference between the $415,000—besides the engines that [825] you have told us about—the $415,000 aircraft and the $600,000 aircraft. A. Well, I don't have the breakdown, but the aircraft, for one thing, could have been and probably were com-

pletely run out, in other words, needing overhaul; and the buyer performing the overhaul of the air frame, that is an item of $50,000, alone, by itself.

The engines, which were in that particular case the dash 13 or higher-priced engines, I use a figure of $20,000 apiece. That would be eighty thousand. There is $130,000. Now there was radio equipment and no passenger interior, things like that, all of which brought out the difference which I use in making my standardization—

Q. Do you know, sir, whether or not USOA's aircraft at this time needed overhaul or not? A. According to the figures that were on your sheet, they did not need an overhaul. One of them only had nine hundred-and-some-odd hours since overhaul. They are good for at least 8000 hours before they need a major overhaul.

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[826] *Redirect examination by Mr. Nickerson:*

Q. I show you Defendant's Exhibit CA for identification, a document dated August 13, 1951, with respect to an aircraft and which shows four Pratt and Whitney engines, Model R2000-7, and ask you what in your opinion would the value of the aircraft as of September 15, 1951 be? A. I see from this document that the aircraft was equipped with smaller engines, the R2000-7, which reduces my opinion of its value. And I would say between $550,000 and $575,000.

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[827] *Recross examination by Mr. Schoenwald:*

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[830] Q. So that one of these aircraft was subject to overhaul and another near most of its life, is that right?

[831] A. No. One of these aircraft had only 900-and-some-odd hours, as I recall, since overhaul and the other had 4000.

Q. You told us that about 8000 was the maximum time? A. I didn't say that. I said that aircraft had to be overhauled or would have to be overhauled as soon as 8000 hours.

The Court: I think you said that after an overhaul it would have at least an expectancy—

The Witness: That is the way I put it.

The Court: Of 8000 flying hours.

The Witness: It could have an expectancy of 10,000 or twelve; it depends on the operator. The CAA keeps some people by experience; they keep running a far longer time between overhauls.

Q. Part of the expectancy of one of these planes, almost half of the expectancy of one of these planes had disappeared already? A. If USOA was operating with CAB approval, 8000 hours overhaul, then about half the expectancy would have been gone. If it had been on 10,000-hour overhaul it would have been 40 per cent.

Q. That would affect your estimate of the [832] value by another twelve to fifteen thousand? A. I included that thinking in my opinion when I said between 600 to 625 thousand originally, because I knew one aircraft had some 3000 hours less than the other one, which is approximately—a good round figure is $5 an hour for allowance for air frame overhaul time. So—

Q. Did you also include in your thinking when, when you told us some figures around 550 to 575, before we

began to get into these items, did you include that 4000 for that estimate? A. Hours?

Q. Hours. A. Yes.

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[868] JORGE MARCANO resumed.

Direct examination by Mr. Nickerson:

Q. Colonel, do you recall that in Exhibit 357, which is the Gotch & Crawford study, there is a statement with respect to an open-end franchise? [869] A. Yes, I do.

Q. What did you understand by that term?

• • •

A. My understanding was that open-end would mean that the franchise did not have a definite date to finish or expire. There was a contract and that as long as I performed, it would be automatically renewed as it was.

Q. You understood that what you had was something that would automatically be renewed provided you performed— A. Performed, yes.

Q. —under its terms? A. Yes.

• • •

[885] Mr. Nickerson: May I just make this short comment and that is that they can't pick out one letter from one of our agents out of context and then not let us explain it by another.

[886] (Defendant's Exhibit BV for identification received in evidence.)

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[897] By Mr. Nickerson:

Q. May I ask you with respect to the cancellation, can you tell us whether or not you gave USOA a credit card? A. Yes, I gave them a credit card.

Q. And can you tell us whether or not you paid [898] $8,440.53 on that credit? A. I did.

Q. That was used after August 15th in connection with the USOA operation? A. Yes.

Q. Can you tell us whether on Defendant's Exhibit CF for identification whether those moneys were advanced to the USOA personnel there mentioned? A. Some were advanced, some were hotel bills that were paid.

Q. Can you tell us whether the advertising referred to on a page entitled "Advertising" on this exhibit was paid? A. Yes, it was paid.

Q. Was that in connection with the AVE operation subsequent to July 25, 1951? A. It was, yes.

Q. Can you tell us whether the bill dated November 28, 1951 headed "Henry Coe—Clerici" was a bill received—first let me ask you whether Coe-Clerici is the agent that was named by USOA and with whom you signed the agreement pursuant to the direction of Mr. Burger as traffic agent for USOA in Rome? A. It is, yes.

[899] Q. Did you receive that bill? A. Yes, I did.

Q. Did you pay it? A. I didn't pay it.

Q. You haven't yet paid? A. I haven't yet paid it, no.

Q. Incidentally, Colonel Marcano, was there mail that was taken back from Rome on the flight of September 9, 1951? A. Yes, there was.

Mr. Nickerson: I will get one more large item, your Honor.

Q. With respect to sheet headed "Payroll—Venezuela, Caracas," can you tell me whether the persons there mentioned were connected with the USOA operation subsequent to July 25, 1951? A. Yes, they were co-pilots, radio operators and hostesses.

Q. And were they paid? A. They were all paid, yes.

Q. By you? A. By me, yes.

Mr. Nickerson: All right, your Honor.

The Court: What is the total amount of the [900] payments?

Mr. Nickerson: I have to figure that up. It is twelve thousand-odd dollars on that item, eight thousand-odd dollars on this item.

The Court: Is it your recollection that the payment made to the co-pilots and other personnel was in excess of twelve thousand dollars?

The Witness: Oh, yes.

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[901] Q. So far in round figures the amounts which you see on Defendant's Exhibit CF for identification— A. Yes. I can say yes because I know it.

Mr. Nickerson: May I offer the sheets which are in evidence, or would you rather I computed it from the—rather, not in evidence, but which are on CF for identification, or would you rather I computed it?

The Court: I think it would be better if you computed it, because if you do anything else, there might be some technical problem of proof.

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[962] The Court: Mr. Schoenwald, I have a feeling you are delaying this trial unnecessarily.

[964] LOUIS ZINMAN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Nickerson:

Q. Mr. Zinman, are you a certified public accountant? A. Yes, sir.

Q. How long have you been one? A. Since 1926.

Q. Are you with a firm of accountants? A. With the firm of Mortimer Stern & Company.

Q. How long have you been with that firm, approximately? A. Well, the original firm was since 1931.

Q. Have you in the last few days examined the books of CAVE? A. Yes, sir.

Q. And have you examined Exhibit 357, the Gotch & Crawford study? [965] A. Yes.

Q. And did you make a computation showing the items considered as entering into the loss figures shown on the statement of estimated assets and liabilities as at June 15, 1951? A. Yes, sir.

Q. And basing your testimony on the books and Colonel Marcano's testimony, can you explain to us the computations that you made, if you will do it in summary fashion?

Mr. Schoenwald: I am going to object to that part of the question which asks him to base it on Colonel Marcano's testimony.

The Court: All right. Overruled.

A. Well, I examined—the books of the company were only up to April 30, 1951, and starting with those figures and other information given to me I arrived at the following:

That between January 1st and June 15th there was a profit on the sale of airplanes of $521,000. Deducting from that a loss up to April 30th, according to the figures shown on the books of $16,536, there were certain other items which were not considered in the June 15, 1951 statement.

[966] Q. And in that connection did you use Defendant's Exhibit CC for Identification? A. I did. The amounts not considered consisted of notes receivable, employees' accounts and sundry accounts, amounting to $132,000, agency accounts amounting to $231,000; certain payments made from the National City Bank account which represented expenses of $49,000. Certain payments to directors and loans from the National City Bank amounting to $13,000, and payment of legal expenses of $10,000. An unascertained amount which we considered as being distributed to stockholders or used for expenses, amounting to $55,000. A reserve for foreign exchange amounting to $126,000. A total of $633,000.

There was also on the books at April 30th an operation reserve which apparently was not used. That operation reserve arose partly in 1950, to the amount of $32,900 and partly in 1951 in the amount of $16,800.

Deducting that from the other items leaves a net deduction of $584,000 from the $521,000 or leaving a loss shown on this statement of $62,500.

Q. With respect to that operations reserve, what conclusion did you draw? [967] A. Well, it is good accounting practice to set up a reserve for estimated repairs and the books show that each month the operating expense was charged and the reserve for operations credited. Whenever a bill came in which was applicable to the repairs of these motors, the reserve account was charged.

At the end of 1950—I have to have that other sheet—at the end of 1950 there was a balance in that reserve of 147,000 bolivars and in January and February 36,000 bolivars were charged against it, leaving a balance of the reserve applicable to 1950 of 110,000 bolivars or $32,950. In 1951 there was credited to that reserve account some 54,000 bolivars or about $16,000.

These accounts were still open on the books at April 30th but did not appear on the June 15th statement and I assume therefore that it was not used and reduced the loss accordingly.

Q. If that money which was in the reserve for 1950 but which was not expended in 1950 had been added to the profit, what would that figure have been, Mr. Zinman? Do you have that? A. Well, the amount of the 1950 reserve which was apparently not used amounted to $32,950, and to that [968] extent the operating profit for 1950 could have been increased.

Q. By the extent of $32,000? A. Right.

Q. But you say that conservative accounting practice would require that that reserve remain? A. I would say so, yes.

Q. For tax purposes, however, would you be permitted to take the reserve? A. I don't know about Venezuelan taxes.

Q. No, American taxes. A. American taxes, if you set up a reserve for contingencies but don't use it, they would allow you only the amount that was actually used.

Mr. Nickerson: I will consent that that be stricken, your Honor.

Q. Did you examine the books, Mr. Zinman, to see what income came during the whole of 1950 from tickets, mail,

parcels, excess baggage and charter flights? A. I checked the amount which appears in the ledger and I checked the figures that were posted there with the comprobantes.

Q. Comprobantes are the daily entries, are they? [969] A. The daily journal sheets.

Q. The daily journal sheets. A. Which are entered into a bound journal and from that journal are posted into the general ledger. The items which appear in the comprobantes checked out with the general ledger, and as far as I can determine they were—the income was only from international operations either for tickets, mail, excess baggage, parcels or—and that is all—special flights. The total in that account was 5,743,725 bolivars.

Q. Can you translate that into dollars? A. In dollars it is $1,714,559. The income figure that is shown in the prospectus is $1,717—

Q. Here it is, page 5. A. —$1,717,332. The difference represented an account called miscellaneous income of approximately $2,787.

Q. Could you tell us whether that was from the international operation or not? A. Well, I didn't check that too carefully, but I think it was income from work which was done in Caracas. Now I also noted in that account—that that account was charged with certain expenses which in my opinion should have been charged to an expense account [970] but not used as a reduction in the gross income.

Q. Will you tell us about that? A. There were expenses, Madrid, tickets, expenses for passengers, tickets, passengers, Venezuela from Puerto Rico, transportation of mail from Puerto Rico, items of that nature.

Q. Those were deducted from gross income? A. Those were deducted from gross income. They amounted to 24,000 bolivars or about $7,290.

Q. In your opinion in proper accounting practice would you have required that that 7000-odd dollars be in gross income? A. I would think that they would be charged as expense of operation rather than a reduction in gross income.

Q. The gross income figure would have been increased by some $7,000? A. That is correct.

Mr. Nickerson: That is all.

The Court: I want to ask a question.

By the Court:

Q. You said that you examined the books up to the position of April 30, 1951. A. Yes, sir.

[971] Q. And that you based your conclusions in part on information you obtained for the period subsequent to April 30, 1951? A. Yes, sir.

Q. What was that other information that you used? A. That was a statement of the account of the National City Bank where the income from the airplane was received and the expenses that were—checks—

Mr. Nickerson: That is part—

A. That he paid out.

Q. I didn't hear what the witness said. A. It was a statement of account with the National City Bank where the proceeds of the sale of the airplane were deposited and the checks which were paid out from that account.

Q. The gross figures purport to be a statement of the entire business activity of this company subsequent to April 30, 1951? A. No, just the statement of that account. And the other information that I base my statement on was explanations given to me by Colonel Jorge Marcano.

Q. Did you reduce those to writing in accounting [972] form? A. I have a statement of the schedule here showing how I arrived at those figures.

Q. What do the schedules purport to show? A. It purports to show on what basis the loss that is shown on the statement was arrived at.

Q. As I understand it this company had no current books of account after April 30, 1951? A. That is correct, as far as I know.

Q. And up to what period did you purport to reconstruct after April 30th? A. Up to June 15. But I made the statement that there was an unascertainable figure which we considered to be payments either to stockholders or for expenses which has been unexplained.

Q. In what amount? A. 55,000.

Q. That is all you found that was unexplainable? A. Yes, sir.

Mr. Nickerson: I think the Colonel so testified on that, your Honor.

The Court: Go ahead, Mr. Schoenwald.

Cross examination by Mr. Schoenwald:

* * *

[981] Q. You understand that the currency was blocked in Spain, do you not? A. That is correct.

Q. And that this currency was blocked from January 1950 all the way to the end of 1950, isn't that right? A. I don't know that.

Q. You don't know the currency was blocked during the whole year? A. No, I don't.

Q. Have you looked into the question of blocked currency at all in connection with your preparation? A. No, sir.

Q. Assume with me that the currency was blocked from January 1950 on to the date June 15th, the date of the prospectus, do you know how much was earned by this company in pesetas in 1950 and which was accrued by 1950 in pesetas? A. I know how much the sales were; I don't know how much expenses were deducted.

Q. Do you know what they accrued on the books of the company for pesetas during 1950? A. I just gave you that answer.

Q. Did you look at the ledger page? [982] A. Yes.

Q. Did you look at— A. Do you mean accounts receivable? Oh yes, I know the accounts receivable, what was on the books.

Q. What were the accounts receivable from Spain at the end of 1950? A. I don't have the figure at the end of 1950, but I do have the figure at the end of April 30, 1951.

Q. What were the receivables from Spain at the end of April 30, 1951? A. Well, that I would have to look at some other paper; I haven't got that here.

Mr. Schoenwald: Can you supply him with the other paper?

The Witness: It is in my envelope. Can I have that envelope?

Q. May we have the notes upon which you based your previous testimony?

Mr. Nickerson: May we have it marked for identification, your Honor?

The Court: Yes.

(Marked Plaintiff's Exhibit 397 for identification.)

The Court: Have you got the information [983] what the Spanish funds were which were blocked as of April 30, 1951?

The Witness: Only from the June 15, 1951 statement. The way I base my figures, I took the balance of the agency accounts at April 30th which amounted to some $492,000 and deducted from that the pesetas that were shown on the June 15th statement of two hundred and whatever they were.

The Court: From that, what conclusion—

The Witness: The conclusion—he didn't take into consideration the balance of funds that were due from the other agencies.

* * *

Q. You understand that a large part of that was earned in 1950, isn't that right? A. Some part of it was earned in 1950.

[984] Q. A substantial part? A. I did not check into the amount, but there was some part of it that was due prior to 1950.

Q. Now did you examine whether or not there were more operations in 1950 than in 1951? A. No, sir.

Q. Then you don't know the proportion of operations in 1950 to the proportions in 1951, do you? A. No, I do not.

Q. Do you know the period of operation in 1951? A. From January to April 30th.

Q. And the period of operation during 1950? A. The whole year 1950.

Q. Are you familiar with that part of the prospectus which indicates that they were operating only on a charter

basis during 1951? A. I don't understand. No, I am not familiar with that.

Q. Assume that the prospectus says that, would that suggest, would that plus the fact that the period of 1951 was much larger than the period of 1950, would those facts together suggest to you that the largest portion of this quarter million dollars in pesetas were earned during 1950? [985] A. Not necessarily.

Q. Is there knowledge that you have to suggest that as a matter of fact more were earned during 1951? A. No, that is why I couldn't.

Q. You don't know? A. I don't know.

The Court: He doesn't know. You have covered that very thoroughly and emphatically.

• • •

Q. Was the profit of $19,000 taken in the prospectus for the $58,000 operating profit calculated before or after the taking of the reserve for pesetas? A. Before.

Q. At the time, at June 15, it was clear that there was a need for a reserve for pesetas, isn't that correct? A. At June 15 there was a reserve.

Q. Taken for pesetas? A. Taken for pesetas.

Q. Had this reserve taken in 1951 been noted next to the net operating profit of $58,000 for 1950 a loss would have been shown? [986] A. I don't think a foreign exchange loss is a proper charge against operating profit.

Q. Would the $19,000 figure be affected? A. Yes.

Q. Then the $19,000 figure would have disappeared, wouldn't it? A. If you assume that that was a loss at that date.

Q. Is there any doubt in your mind that 19,000 dollars was earned during 1950? A. Yes, there would be some

doubt in my mind. It depends on whether you are using foreign exchange or whether the fact that it was blocked funds. I don't know whether the foreign exchange rate was less or more than was put on the books.

Q. Did you notice that in 1950 the ticket rate of this company was increased? A. No, sir.

Q. You did not. Had you known that the rate that they charged for tickets out of Spain in pesetas was increased during 1950, would that suggest to you knowledge during 1950 that as a matter of fact the pesetas were no longer worth what they were worth before? [987] A. The way I look at it is that when they sell a ticket they take into income the amount of the sale. If there is a profit or loss on pesetas it wouldn't affect the operating profit; it would affect the net profit.

Q. Would the change of the rate of tickets of the amount of pesetas that were required for tickets during 1950 show you a change in the value of currency? Would that suggest that possibility? A. I would assume so.

Q. I notice on your work sheet that there was $132,710 and $231,053 which apparently were considered uncollectible. A. No, sir.

Q. What happened to that $231,053? A. The explanation that was given to me is that they didn't have an exact knowledge of how much was due from these agencies. That is the figure you refer to, the $231,000. And that wasn't put on the books because they were awaiting information from the branch offices as to how much was actually due, so they could record any expenses that were made and whatever balance of money was due.

Q. Was anything ever shown to you to suggest [988] that they collected 231,000? A. No, sir.

Q. You don't know that the money was collected? A. I don't know that they were paid or collected or uncollected.

Q. As a matter of fact was anything shown to you to suggest that there was a dividend? Did you see any evidence of a dividend? A. No; only from what I was told that they were distributions made to stockholders.

Q. Did they tell you the date they made these distributions to stockholders? A. No, sir, I told you that was an assumed amount.

Q. Even the amount of the distribution to stockholders was assumed? A. Yes, the amount that was unaccounted for was assumed to be either distribution to stockholders or payment of expenses.

Q. You didn't know? A. No.

Q. This $132,000, that was written off, wasn't it? A. No, sir. [989]

Q. Was there any indication to you that that 132,000 was ever collected? A. No, sir, that was not explained to me as being written off. There were certain amounts that he considered uncollectible and some amounts which he considered would be collected. Whether he collected it or not I cannot say.

Q. Did you ask him? A. Did I ask?

Q. Did you ask him if he collected it? A. In some cases he said he collected and some he didn't.

Q. Did he tell you how much he collected? A. No, sir.

Q. Did you ask him how much he collected? A. No, sir.

Q. Can you tell me, of this combined figure representing approximately $370,000, how much of it do you know as a fact, was actually collected? A. I don't know if any of it was collected.

• • •

[990] Q. Is it good accounting practice to offset a large operating loss against a non-operating loss, showing only the net figure? A. On an income statement?

Q. On anything which purports to describe the history or the facts concerning the company. A. If you are talking about a profit and loss statement I would say no; if you are talking about a balance sheet it isn't usual to show any breakdown of profit and loss in a balance sheet.

Q. Let us refer to the text of this prospectus. A. The prospectus is a balance sheet.

Q. The prospectus, I am talking about page 2, paragraph 2. Do you see that? A. Page 2.

Q. Paragragh No. 2. [991] A. Yes.

Q. In so far as the sentence there deals with operating profit—

Mr. Nickerson: Which is that? No. 2?

Mr. Schoenwald: Paragraph No. 2, page 2.

Q. Directing your attention to that area and directing your attention to page 5 of the prospectus, the top of page 5, with respect to that let me ask you: Is it good accounting practice in statements or in the descriptive text material such as appears therein to offset a large operating loss against a non-operating loss, showing only the net figure? A. This is not a statement. This is just an analysis showing the conclusions. You are—

Q. In setting forth text of that character in a writing—

The Court: No, he is not competent to argue with you with respect to the propriety of the narrative statements in this brochure. It is headed "Summary of Findings and Prospects." And that

is a matter for argument later in the case as to what could reasonably have been understood.

Q. Is it not a fact that, as a matter of fact, the offsetting of non-operating profits against [992] losses is a misleading practice? A. Under what circumstance?

Q. In a statement— A. If you are showing the statement of income and profit and loss I would say that if there were material items it would be bad practice not to show the items separately.

Q. In something which describes the net operating profit, is it not misleading to fail to disclose the existence of a larger offsetting profit—non-operating profit? A. In the stating of net operating income? No, sir, it might be in the stating of net income, not—

Q. In the statement of non— A. You see non-operating profit would have no effect on non-operating income. Non-operating expense would have no effect on operating income.

• • •

Mr. Nickerson: While the witness is coming down, may I offer in evidence Defendant's Exhibit BX which Mr. Schoenwald has seen, which Mr. Marshall testified was billed to CAVE. I don't have the [993] bills. I have searched for them and I don't have them.

Mr. Schoenwald: I am not objecting to its introduction in evidence. I am not conceding the value of the items or the authenticity or accuracy.

(Marked Defendant's Exhibit BX in evidence.)

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[993] ALEJO DE CERVERA, recalled.

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[1002] *Cross examination by Mr. Nickerson:*

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[1003] Q. It is fair to say, sir, that the rationale behind—do you know what I mean by "rationale"—behind the provision of the constitution prohibiting the transfer is that if the person who transfers that contract to another person, loses control over that person, that then the Government has no one that it can get its hands on for the purpose of requiring the performance of that contract? Is that a fair statement? A. In my opinion it is going too far.

Q. Why do you say that? A. Because in Section 13 there is no difference [1004] between having no control or—

Q. You have already testified that something certain could be done. A. Yes. I want to be fair.

Q. And you made a distinction, as I recall, between major and minor things; am I correct? A. Yes, because I want to be fair.

Q. Yes. It is fair to say that the criteria which you used in determining that is whether the control is maintained by the person whom the Venezuelan Government can get its hands on? Is that fair? A. No, no. I remember I put the example of the man who hires someone to clean the window directly and the man who goes to a company to send the man to clean the window. That is a petty detail. I can go as far as to that—

Q. Yes, you could go as far as setting up a maintenance base in Italy as I recall. A. Abroad, yes.

Q. And selling tickets and so forth. A. But remember, I am going along with you because I want really not to be fussy or not to be intolerant.

Q. I certainly appreciate that. Now you know that in 1950 and 1951 Venezuela had a de facto military [1005] junta government. A. Yes.

Q. And you know that the executive branch had all of the executive and legislative functions. A. Yes.

Q. And you know that the executive branch could change the Constitution by decree, do you not?

A. Yes.

• • •

Mr. Schoenwald: There are many questions there.

The Court: He said yes to all of them.

Mr. Schoenwald: He kept shaking his head during the course—

The Court: No. You said "Yes" to all of those proposals, didn't you? There was a junta, there was a military junta, which had both executive and legislative powers?

The Witness: It is difficult to say that.

The Court: And they worked by decrees. You don't know that to be the fact, then?

The Witness: I do not know that to be the fact.

The Court: Then the answer is no.

You go ahead.

Q. You knew that there was no legislative branch at all? [1006] A. If I go to the Constitution I know there is—

The Court: No. That is theory. Mr. Nickerson is asking you facts. The theory of government in the Constitution is one thing, but he is asking you whether in fact there was a legislative arm of the Government functioning through a duly elected

congress in Venezuela in 1950 and '51 or whether the legislative power was in the hands of the military junta.

Mr. Nickerson: Apparently he does not know the facts.

The Witness: Apparently I do not know that fact.

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[1007] ALEXANDER ROZAWICK, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Schoenwald:

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[1008] Q. Can you tell us in 1951 what the value of the DC-4 with R2000-7 engines was equipped for passengers? A. Between $250,000 and $350,000.

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[1010] Q. Do you know of any sales on or about September 1951 or very close to that time? A. In that specific time I don't really know of [1011] any sales outside of the periods of time which I have stated.

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[1015] Mr. Nickerson: Reading from page 3 of Mr. Webb's deposition, taken on September 23, 1952:

"Q. Mr. Webb, you were formerly employed by United States Overseas Airlines? A. That is correct.

"Q. During what period were you employed? [1016] A. I was actually on the payroll records from April 15, 1951, until I resigned on June 16, 1952.

Deposition from Lloyd Webb

"Q. Were you an officer of the company at any time? A. Yes, I was.

"What office did you hold or offices did you hold during that period of time? A. I was vice-president of the company and also vice-president of operations and also a director of operations."

Page 7:

"Q. In these phone calls"—

May it be conceded that those are the phone calls which Mr. Cox has testified to between himself and Mr. Webb while Mr. Cox was in Europe and Mr. Webb was in London? Is that conceded?

Mr. Schoenwald: All right. Subject to some correction if I find anything.

Mr. Nickerson: (Reading.)

"Q. In these phone calls did Mr. Cox mention that Mr. Wooten had operated the franchise of AVE and CAVE? A. He didn't mention it in the telephone conversations, he mentioned that in England when we were talking to each other.

"Q. What did he say about Mr. Wooten's operating [1017] the franchise? A. I think he recommended that if Wooten had operated it, it was bound to have been quite a bit of money made."

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Page 12, the last question:

"Q. Did you talk to Mr. Cox after he returned with Defendant's Exhibit 13?"

That, your Honor, is now Defendant's Exhibit N; the contract between USOA and—I think it is N.

The Court: Yes, N.

Mr. Nickerson: N, between USOA and CAVE.

• • •

"A. Yes, he showed it to me and Mr. Clemett at the same time.

"Q. Where were you? A. In Ralph Cox's office at Wildwood, New Jersey.

"Q. Was there any conversation? A. He told us that the contract was signed, it [1018] was completed.

"Q. Did you say anything? A. I just read the contract and then I stated that if I were him I wouldn't have signed it.

"Q. Did he say anything to that? A. He just said he was familiar enough with the aviation business that he could handle it. I asked him if he had an attorney present when he signed the contract and he said no.

"Q. What did you say to that? A. I said I thought he should have had an attorney present.

"Q. Did he reply to your remark? A. Yes; he replied that he had been in the aviation business long enough and he knew what he was doing."

Page 17, next-to-the-last question:

"Q. Before you went down to Venezuela on"—it says "December 9th" but perhaps it will be conceded that it is "September 9, 1951"—that is a misprint.

The Court: Is that conceded?

Mr. Schoenwald: Yes.

Mr. Nickerson: (Reading.)

—"did you have a talk with Mr. Cox? A. Yes, I did.

[1019] "Q. Could you tell us where and when and wh

was present? A. The beginning of September; Mr. Jones was present. He wanted me to go down and—

"Q. You mean Cox? A. Yes. Cox wanted me to go down and repossess the airplane.

"Q. What did he say and what did you say as best you recall? A. I didn't say very much. Most of the things I did was just plain listening.

"Q. What did Mr. Cox say? A. He wanted me to go down and repossess the aircraft on the next flight down to Venezuela and divert it into the United States."

Page 20, third from the last question:

"Q. Did Mr. Cox tell you why he wanted to get the airplane back? A. It didn't look like so much money was going to be made and he thought he would make more money on the Korean airlift.

"Q. Did he say that? A. Yes."

Page 21, the second question:

[1020] "Q. Did you ask whether he had a right to pull the airplane off in the light of his contract, Defendant's Exhibit N? A. I asked him about the possibility of a lawsuit and he said 'We will worry about that after we have the airplane back.'"

Page 24, the second question:

"Q. What was the substance of your conversation with Mr. Burger?"

May it be conceded that, if you will refer to the previous part, is a meeting between Mr. Burger, and Mr. Webb in Caracas on or about September 10th?

Mr. Schoenwald: I think it was Bermuda, but it doesn't make much differenee.

Mr. Nickerson: Bermuda or Caracas.

Mr. Schoenwald: Yes.

Mr. Nickerson: (Reading.)

"A. Mr. Burger asked me—after we left the airport he decided we should ride to town alone in a taxicab.

"Q. Alone? A. Yes, without the rest. He asked me if I was down there to pull the airplane back. I told him that it was nothing definite yet; I was more or less supposed to look over the operations before any plans were made. [1021] I didn't want to alarm him at the time.

"He went into detail explaining the great possibilities of the AVE operation and several other deals that he had so-called cooking, and he went back to talking about the wonderful opportunities that the AVE operation had again.

"Q. Did he go into details as to why he thought the AVE operation was or would be profitable? A. Yes, he did go into details.

"Q. Can you recall in substance what he said? A. Not exactly. I couldn't recall his exact words.

"Q. In substance. A. He just spoke about the potentialities of the tremendous passenger traffic from Rome and also from Madrid and the possibilities of all the westbound traffic that could be taken out of those ports, and he went into it in great length. I couldn't repeat his exact words; it was too lengthy a conversation."

• • •

"Q. Prior to the time that you compiled Defendant's Exhibit 120"—

[1022] Your Honor, that refers to a statement which Webb prepared, and perhaps it will be conceded, at the request of USOA with respect to this litigation.

Mr. Schoenwald: Are you asking me to concede something?

Mr. Nickerson: Yes.

Mr. Schoenwald: We are going to concede that there is a statement and we would like very much to have it in evidence. If you want to offer it in evidence—

• • •

[1023] "Q. Prior to the time that you compiled Defendant's Exhibit 120, did you talk with Mr. Cox about compiling the statement? A. Yes.

"Q. What was your conversation? A. There were so many conversations.

"Q. Can you tell us the first one? A. He just wanted a statement made in regards to [1024] what transpired in Venezuela while I was down there, in regard to the whole story that I told him.

"Q. Do you recall anything else of your conversations with Mr. Cox relative to your making a statement? A. Yes; I recall something else. When I was making up the statement, Mr. Cox told me to make it stronger against Marcano than Burger because, he stated, we were going to have a lawsuit with Marcano and he was the fellow we had to worry about, not Burger.

"Q. Did he ask you to change your statement? A. Yes, he did.

"Q. In what way did he ask you to change it? A. To put Marcano in the No. 1 spot, of accusing him of wanting to steal the bill of sale instead of Burger."

Page 33, the next-to-the-last question:

"Q. Did Marcano ever say to you in Venezuela or while you were coming up to the United States that he had

no concern in your controversy with Mr. Cox as to your ownership of the airplane? A. He made that statement."

Page 39, the last question:

"Q. Was any recording made of any telephone [1025] conversations other than the one that you had with Marcano and Burger on the 14th?"

That is the 14th of September, your Honor.

"A. There were approximately two recordings made and oufside of that I would say Mr. Cox records every telephone conversation regardless. It is standard procedure with him."

Page 44, third question:

"Q. Do you recall in substance what was said in that meeting?"

May it be conceded that that is the meeting of September 15th in USOA's offices at which Mr. Russell was present?

Mr. Schoenwald: Yes.

Mr. Nickerson: (Reading.)

"A. Mr. Russell demanded that according to the contract the operation be carried on further, give it a chance to prove itself. He said something like that.

"Q. Do you recall anything else? A. Nothing in particular.

"Q. Do you recall anything said with respect to providing a moratorium on the $3,000 a week payable by USOA? A. I think Marcano said he would forget that [1026] temporarily until the operation proved successful."

Page 74, the last question: This is cross-examination by Mr. Halpert:

Deposition from Earl W. Clemett

"Q. I believe you testified that Mr. Burger, when you met him in Venezuela and during your several conferences down there, told you about the AVE operation and that he told you in detail its glowing possibilities. Did he specifically state to you what the present traffic situation was out of Rome? A. Yes, he did.

"Q. What did he tell you? A. That the potentialities were tremendous. The reason that the loads were small was due to misfortune. One bus broke down with a load of passengers on a back road and was stuck and never made it to the airport on time. They waited a day and the bus still couldn't get to the road, it was a washout, due to extenuating circumstances.

"Q. Did he tell you that the visa situation had been cleared up? A. Yes, he told me that it had been cleared up."

I am going to read from the deposition of Mr. Earl W. Clemett taken on the same day.

Page 81:

[1027] "Q. You were at one time connected with USOA? A. Yes.

"Q. When did you start? A. January 1, 1951.

"Q. Did you remain with USOA during the year 1951? A. I did, yes.

"Q. In what capacity? A. Vice-president.

"Q. Through the entire year? A. That's correct."

Page 88, last question:

"Q. Could you tell us in substance what the discussion was between you and Cox after you read Plaintiff's Exhibit 1?"

It is now 357, the Gotch & Crawford study, your Honor. And may it be conceded that this is a

meeting between Clemett and Cox prior to July 25, 1951, and in the vicinity of July 17th the previous questions?

Mr. Schoenwald: Subject to correction, yes.

Mr. Nickerson: Instead of doing that, then I will read each previous question—the two previous questions:

"Q. Would you give us the date of this conversation? A. This was probably two or three days prior to its being signed.

"Q. Prior to July 25, 1951? [1028] A. Yes, probably in the vicinity of July 17th to the 21st, somewhere around that time.

"Q. Could you tell us in substance what the discussion was between you and Cox after you read Plaintiff's Exhibit 1?"

That is now 357.

"A. I hadn't completely digested the whole thing but I still kept arguing with Mr. Cox on the point that if it was such a glorious opportunity, why did the man sell his own airplanes. Even if his airplanes were in bad shape, he could have sold one and with the money fixed the other one and gotten another.

"Q. Did you talk to him on that subject one or several times? A. I would say probably three times.

"Q. In each instance did you raise the same point, namely, that you questioned why he got rid of his airplanes, if it was a profitable operation? A. I would say yes. I also raised the point that for the year he showed his operation in 1950, it just happened to be Anno Sancto or something, a Catholic holiday, some rites that could

only take place in Rome; he had religious priests going back and forth that wouldn't be traveling any other time.

[1029] "Q. Did you discuss that with Mr. Cox more than once? A. At least once."

Now, your Honor, I am going to read from the deposition of Mr. Cox.

• • •

[1030] Page 63, first question. And may it be conceded that this is also in the conversation with Mr. Marshall?

[1031] Mr. Schoenwald: Yes.

Mr. Nickerson: (Reading.)

"Q. Did you tell him, do you recall, what the market value of the planes you had was? A. We presumed the market value to be around $500,000 to $600,000 at that time per plane, because the demand was such that it pushed the price up there. As a matter of fact, I believe Marcano was the first who had ever sold a C-54 for $500,000, a rather high figure at the time."

Page 405, and this is the last, your Honor:

Mr. Schoenwald: 405 of Mr. Cox?

Mr. Nickerson: Yes. May it be conceded that this is in the meeting at which Mr. Russell attended on September 15, 1951?

Mr. Polak: My notes show it is the 14th.

Mr. Nickerson 14th.

Mr. Schoenwald: The meeting in New York, in September.

Mr. Nickerson: Yes.

Deposition from Ralph Cox, Jr.

"Q. My question is, did you discuss the terms of the contract?"

Then there is some colloquy: and again:

"Q. Will you finish your answer and answer my question. [1032] A. I told these people that as far as we were concerned, the contract was done; we were pulling out and we had nothing more to do with it. We were hoodwinked. They were trying to steal our airplane, in our opinion."

• • •

[1033] (Defendant's Exhibit CD received in evidence.)

• • •

[1042] Mr. Nickerson: Your Honor, I can concede with respect to these documents which we were shown which Mr. Zinman had been studying, either that they relate to national operations or that they appear on the books. In fact, we know they do not appear on the books.

The Court: Very well.

[1043] Mr. Nickerson: I am sorry. That was not credited to the operational accounts.

The Court: As I recall, Mr. Schoenwald did not press his question with respect to these documents after I sustained your first objection. All right.

• • •

[1048] The Court: Now, gentlemen, I think that, in accordance with the usual practice, the defendant should speak first, but since there are counterclaims here I have no objection if you wish to reverse the usual order; but I think Mr. Nickerson should address himself first to his case, and then I will hear Mr. Schoenwald.

Mr. Nickerson: Whichever your Honor prefers.

The Court: Then I suggest that you begin your argument.

• • •

[1053] The Court: There was some delay, as I recall it, about the Lisbon rights, wasn't there?

Mr. Nickerson: I am talking now about September 14th. We got the Lisbon rights September 8th. I am talking as of the date of September 14th. But the Lisbon rights were in complete order. We have a document which shows that.

• • •

[1055] But certainly that would not entitle him to rescission of the contract.

The Court: I understand that as a proposition of law, and I think I can save you some time by telling you that to the extent that this case is based upon the failure of CAVE to provide full loads, I do not regard that as a valid ground for damages or for rescission because there is nothing in the contract or in the relationship between the parties which could reasonably have justified USOA in contemplating that CAVE held out a guarantee of full loads. All of the evidence indicates pretty clearly that this business had to be built up, that efforts had to be expended to build it up, and that they could not expect to be carrying full [1056] loads of passengers right from

the beginning, and I think that appears right out of the papers and testimony of USOA itself.

• • •

[1062] The Court: Here was a company which was as close to being in a position of non-operation and complete frustration as it is possible for it to be. It had sold its equipment. It no longer was running schedule flights. It had lost substantial amounts of money. It had lost a very substantial amount of money just before this contract was executed.

• • •

[1063] True, it had a valuable franchise.

Mr. Nickerson: That is what I am asking for, damages for loss of that, your Honor.

The Court: Just a minute. We have got to relate the value of the franchise to the surrounding circumstances. A man who was dying of thirst in the middle of the Sahara Desert would gladly exchange a ton of coal for a quart of water, and a ton of coal in the middle of the Sahara Desert to a man dying of thirst is of no value at all.

Mr. Nickerson: Correct.

• • •

[1064] Mr. Nickerson: Let me explain to your Honor first that by the end of this contract, as an absolute minimum, CAVE would have had in its treasury some one hundred and fifty-six thousand dollars.

The Court: How do you arrive at that?

Mr. Nickerson: Because it gets that in its $3000 a week guarantee, and all of the other expenses are to be paid by USOA.

The Court: You mean assuming that USOA adhered to the literal terms of this contract right to the end of the year the Venezuelan company would have collected exactly what?

Mr. Nickerson: Exactly to the dollar, your Honor, no less than $144,000.

The Court: How do you arrive at that figure?

Mr. Nickerson: They were guaranteed $3000 a week under paragraph 1(f) of the contract.

The Court: Didn't you waive a substantial part of that?

Mr. Nickerson: No, your Honor, we did not waive it at all. That was on the supposition that a new agreement could be reached thereafter.

The Court: No, I thought part of it was.

[1065] Mr. Nickerson: No, I waived the $2,250 which was the first roundtrip and the trip back from Caracas to Rome.

The Court: Are you including in that waiver—

Mr. Nickerson: No, I am not. $144,000 they would have got, irrespective.

• • •

[1066] Bear in mind that the immigration from Europe to Venezuela, bear in mind that tremendous public works program in Venezuela and the tremendous flow of immigration that has been increasing every year from Europe to Venezuela. So I do not think that it is fanciful to assume that this could have been made if USOA had lived up to its contract. This was a very valuable thing; this was one of the last routes in the world to be developed.

The Court: This business of transporting immigrants is a highly competitive one in which national interests are frequently very involved, and there is no assurance

that any specific proportion of this would have gone by air, or if they had gone by air, whether they would have gone by your country's. It is something that is in the realm of speculation.

Mr. Nickerson: The only way you can look into the future is to make reasonable assumptions from what has happened in the past. LAV started flying this route. Your Honor heard Colonel Marcano testify that he took over this route and he started flying. So it was not any losing operation. Of that we can be sure.

The Court: Was LAV organized when this [1067] company gave up its franchise?

Mr. Nickerson: It is not in the record, your Honor. Do you want me to tell you?

The Court: No, never mind. I thought it was. Didn't Colonel Marcano testify that he had had negotiations with SAS and that they came to nothing?

Mr. Nickerson: Yes. You see at that time of course there was a terrific equipment squeeze, as your Honor has heard, but had they been able to keep alive for that year and had USOA lived up to its contract, they would have had all that money in the till which they could have used to keep this thing alive.

I don't want to dwell on it. That is the only way we can look into the future, is to make reasonable inferences from what has happened in the past. And I ask for $500,000 for the value of the franchise on the basis of the evidence which is in.

The Court: Do I understand you correctly to say that if USOA had complied with what you deemed to be its obligations under this contract, that then CAVE would have collected by the end of the contract period roughly $140,000 in cash?

Mr. Nickerson: $144,000 minimum, absolute [1068] minimum.

The Court: And that by the use of this cash CAVE would have been enabled to preserve the existence of its franchise, but that the loss of this cash was the direct cause of the loss of the franchise and therefore USOA should pay for the franchise as well?

Mr. Nickerson: Well, your Honor, I would not put it quite that way. I would say a minimum, they had to get $144,000 on their $3,000 a week guarantee from USOA over the term of the contract. They could have used that $144,000 net—not a nickel's worth of expense came out of that. All that was paid by USOA. They could have used that $144,000 to finance or otherwise keep alive, whether by renting planes on a dry lease basis, whether by entering into some deal perhaps for the purchase of them, whether this is an effort to finance it or some other way, but I say it is reasonable to assume that if a company has $144,000 net at the end of a year, that it isn't just going to give up the ghost and say, "This is the end."

• • •

[1070] Now to answer your question directly, your Honor, I would only say they would be reasonable for those damages which they reasonably could foresee at the time that they entered into the contract, and I submit to your Honor that USOA certainly reasonably could foresee this eventuality.

The Court: You make that argument notwithstanding the fact that CAVE was already in imminent danger of losing its franchise before it entered into this contract, by virtue of the sale of its equipment and its inability to maintain flight schedules?

Mr. Nickerson: I think that increases the validity of my argument, because it gave USOA good reason to suppose that if they pulled out of this that the franchise would be lost, and, in fact, Mr. Russell's testimony, your Honor, that at the meeting on September 15th the valuable thing to us here is the franchise and if this thing is pulled back here and if you pull it [1071] out, we are going to lose the franchise—we put the franchise in jeopardy; I don't recall the exact wording, but there was certainly testimony of that character at that meeting.

So that I certainly think they could reasonably foresee that as a result of their breach we would lose this very valuable thing, and what value you put on it of course is a matter that you can't tie down as if it were damages for a breach of a bond and mortgage, because it inevitably has to be a process of forecast based upon reasonable assumption of what has happened in the past.

• • •

[1077] Mr. Schoenwald: • • • [1082] Is the rent that one particular tenant, namely, a party to this action, is willing to pay for the franchise adequate evidence of its value?

The Court: Yes, that is the best evidence. It is the value reached at arm's length after careful negotiation and inquiry, as to both parties, as to what [1083] would best serve their individual interests.

Mr. Schoenwald: I think not, your Honor. I think the cases indicate that value has to be based upon experience and upon market value; that one person could be misled into assuming that a particular thing is of great value—

The Court: If what you are referring to is your case for fraud, I don't think there is any basis for it at all. Of course I agree to the naked principle that very often people will be induced to enter into improvident contracts

as a result of fraud, deceit or other imposition, and obviously such a contract would not possibly stand as a reasonable measure of the value of the consideration, but absent a proper showing of fraud and deceit or other imposition, you are in no position, it seems to me, after the proof in this case, to argue that what USOA agreed to do here was the result of some form of fraud or deceit or that USOA entered into an improper contract.

• • •

[1093] Mr. Schoenwald: • • • [1094] We have not been able to demonstrate to the Court's satisfaction that the Colonel was the author of this plot to steal the bill of sale. However, the mere standing by and omitting to mention this is in itself a breach of the obligation.

The Court: A breach of what obligation?

Mr. Schoenwald: It is a breach of his obligation as an employee of the contracting party. As a matter of fact, I think that even if they were not contracting parties, the knowledge of one citizen that some other citizen was about to steal his property is something which he is obliged not only to report to the citizen but to the government.

The Court: I think it is just atmosphere. I think it has nothing to do with the case. Mr. Cox certainly didn't come forward and produce all of the [1095] mortgages on these planes or all of the part-interest in the planes. There is no showing that he pulled out of his safe every single document bearing upon the title to these planes. And why should an incident of a collateral nature have anything to do with the dispute over the prior proprietorship of one of these planes suddenly thrust Colonel Marcano in a position where he stands over everybody as a

sort of guardian? He wasn't. He wasn't a trustee, a fiduciary.

• • •

[1111] Mr. Schoenwald: I would like to continue with this for a moment. I think that my adversary would perhaps, in connection with my reference to point 1-I, advert to the clause which guarantees payment of $3,000 [1112] a week, and I perhaps should not anticipate that, but I think that it bears consideration.

I think you will note that throughout the correspondence between the parties and indeed throughout the contract, that the concern of the defendants was with our ability to furnish the aircraft and get them there on time. The contract provides in clause 1(b) that we are to immediately replace any aircraft not able to perform and serve, that we are to put the airplane down by September 15th, that we have a certain amount of time not to put down two airplanes, but for 60 days we need not operate regularly if it is economically difficult for us to do so. And I suggest that the guarantee of payment of $3,000 a week after September 23, 1951, when we then first had a firm obligation to fly, irrespective—or pay $3,000 a week, is an effort by the defendants to be sure that two airplanes are committed or that that many trips are flown, and that the failure to fly because we might have a more profitable load elsewhere, or we don't own the airplanes or don't maintain them otherwise, could result even in the absence of our flying in a payment of $3,000 a week. So the provision for the payment of $3,000 a week goes to the defendants whether we fly or not, and the [1113] contract is replete with concern over the necessity of our flying.

• • •

[1116] I would like to suggest that the defendant is in a bit of a dilemma. On the one hand, Colonel [1117] Marcano maintains he has no duty to us whatever, nothing to do but keep the franchise in good order; wrote letters to the right people, make the right statements to the right political people. On the other hand, he said we had all the important duties because, after all, that is our franchise. I suggest to your Honor that the Colonel has been attempting to straddle, throughout this trial, this problem. That he had no duties, so he couldn't be found in breach of them, and to claim that all of the responsible duties he did have—

The Court: You were trying to exploit this franchise, weren't you? You were the active exploiters of the franchise. His role was a passive one. You sought this situation as a business opportunity and you sought to exploit it. And while it is true that he reserved very extensive rights and control, is it fair to say that he should be blamed because he didn't exercise them? You didn't want to be interfered with. You were taking over, so to speak, the running of those schedule flights, and you were operating under his franchise, and that was the position of the parties at the time you entered into the contract. Now why do you say he was straddling? There was nothing for him [1118] to do except what this agreement said he needed to do, and most of the active, aggressive, day-by-day exploitation and business decision was to be carried out by you.

Mr. Schoenwald: That is correct, your Honor. However, I think the Colonel had a duty to maintain the rights in good order, which he didn't, and I would like to address myself to his failure to maintain the rights in good order.

Colloquy

The Court: Which rights?
Mr. Schoenwald: The European rights.
The Court: Which ones?
Mr. Schoenwald: Italy.

• • •

[1120] Your Honor has already brought forward that with respect to rights in Portugal.

• • •

Translation of Opinion of Dr. Ramon Tenorio

In the hearing of the 21st of June 1956, during the afternoon, I appeared and testified before the Honorable Court, as an expert witness on certain questions of Venezuelan law relative to the contract between CAVE and USOA.

I was asked by the attorney for CAVE whether in my opinion the contract between CAVE and USOA, dated July 25, 1951, constituted, under Venezuelan law, a transfer of the rights and obligations acquired by CAVE under its contract with the Federal Executive of Venezuela, and I replied that in my opinion that contract between CAVE and USOA did not constitute a transfer of those rights and obligations. At the request of the same attorney I gave the legal reasons which served as the basis for my opinion.

Cross-examined in the same matter by the attorney for USOA, I sustained repeatedly my opinion and the reasons I gave to substantiate it.

With this opportunity to submit for the consideration of the Court my position, I respectfully do so in the following terms:

First, I reaffirm in toto my testimony heretofore given. Second, it is my firm conviction that the contract of July 25, 1951 between CAVE and USOA does not, under Venezuelan law, constitute a violation or a transfer of the rights and obligations acquired by CAVE under its contract with the Federal Executive of Venezuela, because at all times CAVE maintained and exercised control of USOA. That control by CAVE and USOA appears expressly in the two stipulations or clauses, which in my opinion constitute the key factor in the contractual relations between both parties. I refer specifically to the

stipulations contained in paragraphs 3(B) and 2(C), respectively of the contract between CAVE and USOA, and which deserve detailed analysis.

Paragraph 3(B) of the contract above referred to expressly provides: "Matters of policy and questions of major concern relating to the conduct of the operation will be determined and carried out in accordance with properly adopted decisions of the Board of Directors of CAVE." This clause clearly sets forth that both matters of policy of the company and matters of major concern relative to the conduct of the operation are reserved for formal decision of the Board of Directors of CAVE.

Now, it may be asked: What does that operation consist of and which are matters of policy of the company and matters of major concern relating to the conduct of the operation? In my judgment the operation consists in the flights and in the transport by aircraft of passengers, cargo and mail. In accordance with its special character, "the matters of major importance relating to its conduct," must be those matters which are referred to as maintenance services, traffic functions, ticketing, etc. In harmony with that analysis, it appears to me that the matters of policy of the company must be those referred to as relations with the public in general, passengers, and owners, shippers and consignees of the cargo and mail, as well as with the governments of those countries on the route having terminal points at Caracas and Rome.

In addition, under the provisions of paragraph 2(C) of the contract between USOA and CAVE the latter reserves the right to make final decisions on all matters relating to personnel. In other words, CAVE has the right to veto anything concerning the personnel, and by virtue of that power of veto CAVE could reject any decision or act of USOA which CAVE considered inconvenient or injurious

to its interest or to the good name and credit of the Venezuelan flag.

From this analysis, I conclude that CAVE, in accordance with the control which it exercised over USOA and over the flights and over all maters related to the same, maintenance, traffic, ticketing, personnel, etc., did not at any time or in any case relinquish or intend to relinquish the franchise granted by the national government of Venezuela or the rights and obligations derived from that franchise.

On the other hand, in the memorandum dated July 30, 1951, which is in the record, CAVE informed the Federal Executive of Venezuela through its appropriate branch, the Ministry of Communications, of the arrangements which CAVE had made with USOA. In that memorandum CAVE informed the Minister of Communications of Venezuela that in order to reactivate the operations of the company, USOA had agreed to supply two DC-4 aircraft and a third aircraft in case it was needed for the better development of the operations and that in the same way USOA obliged itself to furnish the working capital needed, all technical help needed by CAVE and to train Venezuelan personnel. The aforementioned memorandum adds that CAVE agreed to sell to USOA up to forty per cent of CAVE'S authorized shares.

Therefore, the Federal Executive of Venezuela by this memorandum, and by the memorandum dated August 14, 1951, obtained complete knowledge of the arrangements between CAVE and USOA. What then was the attitude of the Venezuelan Government with respect to this agreement? Was it a negative or a positive attitude? I have no doubt that it was a positive attitude, in other words, that the aforesaid agreement was approved. That positive attitude becomes very clear from the fact that the

Minister of Communications, as the appropriate branch of the Federal Executive of Venezuela in these matters, having full previous knowledge of the arrangements between CAVE and USOA, directed the Office of the Minister of Foreign Relations of Venezuela to request from foreign governments the corresponding permits and other privileges for CAVE. In my opinion that constituted written, and therefore express, approval of the above-mentioned agreement.

Moreover, I consider that the contract between CAVE and the Federal Executive of Venezuela is a contract of public interest within the meaning of the Venezuelan Constitution, that is to say, that the state and Venezuelan nation are interested in it. The contract between CAVE and USOA is not such a contract, because, among other reasons CAVE did not relinquish, but on the contrary always retained for itself, the franchise granted. It is evident that if the contract between CAVE and USOA had been deemed by the Venezuelan Government a transfer of the franchise, the contract would have violated the provisions of the franchise. The sovereign government of Venezuela in defense of the rights and interests of the state and Venezuelan nation not only would have rejected the contract but also would have demanded its cancellation, and we know that this did not happen. I have stated before that the national government of Venezuela gave written approval to the agreement between CAVE and USOA, which is sufficient proof that it is perfectly legal.

Third, we now examine in the light of the juridical doctrine and the law of Venezuela what a cession or transfer is and what are the legal effects thereof.

Cession is the transmission by an act between living persons of an incorporeal object, a right, for example. It is one of those contracts which has for its object the

transmission of property or of a right. The right ceded is transmitted, and the transferee acquires it, along with the danger and risk thereof. In other words, the transferee acquires for himself the right ceded, acquires full control over the right ceded, and acquires likewise the exclusive power to exercise all actions inherent in that right. By virtue of the transfer, the transferee takes the place of the transferor. If, as I here deny, the agreement between CAVE and USOA had constituted a transfer, a juridical relationship would have been established between USOA and the Federal Executive of Venezuela, and we know that that is not the case. Moreover, could USOA, as if it had been a transferee, dispose freely of the obligations and rights which are contained in the contract with CAVE? Could USOA, for example, determine and exercise for its own account and risk, without the consent, approval or intervention of the Board of Directors of CAVE, the matters referred to in 3(B) of the contract? It is evident that USOA could not. By the same token, could USOA make final decision and carry out by itself, outside the control of CAVE, all the matters relating to personnel? It is certain that USOA could not do this either. Finally could USOA transfer freely even one of the rights or stipulations set forth in the contract with CAVE? This could not be done either, in the light of the express prohibition contained in paragraph 3(F) of said contract. Then, if USOA was unable to dispose freely, with an exclusive power, of any of this, the clear conclusion is that there is no cession, and therefore that there has been no transfer.

Fourth, the transfer having been denied, let us examine to see whether there has been any violation. A violation is the action of violating, of breaking a legal precept or a contractual obligation, or of not complying with what has been agreed upon.

Let us make a review of the provisions of the franchise between the Federal Executive of Venezuela and CAVE. In reference to these provisions let us see if the contract between USOA and CAVE violates the franchise.

By the first clause of the franchise there is granted to CAVE a franchise, that is to say, authority to exploit in the country, in conformity with the franchise and subject to other applicable laws, a public aviation transportation company for the transport of passengers, cargo and mail and for flights for advertising purposes, etc., etc. For reasons which have been set forth in my oral testimony before this high tribunal, and which have also been set forth in this opinion, I consider that there has been no transfer of violation by CAVE of that clause.

By the second clause, the duration of the franchise is fixed as one year from the date of signature, and establishes the obligation on the part of the contractor to accomplish regularly the flights which have been undertaken by the company, etc. From an examination of that clause one can see that it does not oblige CAVE itself, without agents, to accomplish regularly the flights which are stipulated therein. In other words, the clause does not prohibit the contractor from accomplishing the flights by means of a contract with another aviation company. In my opinion this was the intention of the contracting parties. What is contained in clause II must be read in connection with clause III, which provides that "the aircraft in the service of the company and owned by the company." In other words clause III makes a distinction between aircraft in the service of CAVE and aircraft which are owned by CAVE. This means that CAVE could operate flights with aircraft which were not owned by CAVE. Even when USOA operated the flights there was no violation of the above-cited clause II for these two

reasons: first, because no transfer was made, and second, because the government of Venezuela accepted and approved the fact that USOA accomplished the flights in accordance with the correspondence which CAVE sent to the Minister of Communications and which is in the record.

Under clause III of the franchise the aircraft in the service of the company and those owned by the company were required to pay the appropriate charges for the use of the civil airports and of their facilities. It is my understanding that these payments always were made by CAVE to the Government of Venezuela. USOA made payment to CAVE, and CAVE paid the Government of Venezuela. Therefore, the juridical relationship which arose out of the franchise between the Federal Executive of Venezuela and CAVE was permanent and unaltered, and the Federal Executive could always claim from CAVE the fulfillment of the obligation imposed by that clause. In addition, the payment of the charges for the use of Venezuelan Civil Airports and of their installations is one of the matters of major concern relating to the conduct of the flights, which by paragraph 3(B) of the contract between CAVE and USOA was reserved for the determination of the Board of Directors of CAVE. For these reasons, I consider that there has been no violation of this clause.

Clause IV of the franchise establishes that the aircraft of the State and of those others specifically mentioned, shall have the right during the life of the franchise to the free use of the airports owned, administered or enjoyed by the contractor or his company, and also the lighting service, radiotelegraph, radiotelephone and meteorology of the same. In my opinion, these provisions refer solely to the airports and to the lighting service,

radiotelephone, etc., owned, administered or enjoyed by the contractor or his company at the time of the execution of the franchise. In other words the clause does not oblige the contractor to create or purchase a private airport or to take over the administration or enjoyment thereof. This interpretation appears logical to me in the light of the fact that in Venezuela no private aviation company owns airports. Aviation companies in Venezuela, whether owned by the State, partly owned by the State, or privately owned, as well as foreign companies which operate in the country by reason of international agreements, always use the airports owned by the nation. For these reasons this clause has not been violated.

Clause V of the franchise fixes the Venezuelan percentage of the personnel, non-skilled, administrative and technical which must be employed by the company. But it also provides that the Federal Executive may reduce the per cent of the technical personnel by reason of a proven scarcity thereof.

CAVE by it memorandum dated August 14, 1951 informed the Government of Venezuela of the situation in that respect. That memorandum was addressed to the Director of Civil Aeronautics of the Ministry of Communications. Since we know the Ministry took affirmative steps to obtain for CAVE from the foreign governments the respective permits and other privileges, it is my opinion that this clause was not violated. If there had been any irregularity with respect to the Venezuelan percentage of personnel, as required in clause V, the Ministry of Communications of Venezuela, which has under its charge the inspection and control of everything relating to civil commercial aviation, would have made this clear and would have demanded the carrying out of the franchise or would have required compliance with the

provisions of this clause, and neither of these things occurred.

By clause VI CAVE agrees to train Venezuelan personnel. But under the agreement with CAVE, USOA assumed the obligation of training the Venezuelan personnel. CAVE so informed the Government of Venezuela in the memorandum dated July 30, 1951 addressed to the Ministry of Communications. The Ministry made no objection or criticism in that respect. We know the attitude taken by the Ministry. Therefore, I judge that there was no violation.

By clause VII the aircraft of the contractor must carry a Venezuelan co-pilot in each flight. This clause is vague because it does not state whether it refers to aircraft owned by the contractor or aircraft in the service of the contractor, in accordance with the distinction made in clause III. In the light of this vagueness a restrictive interpretation must be taken, in conformity to the logical rigor of the sentence. Textually the clause recites "on each flight the aircraft of the contractor." In my opinion this refers to the aircraft which are the property of the contractor and not to the aircraft in the service of the contractor. But, in addition, the record shows that on all flights made by USOA a Venezuelan co-pilot was used. For this reason this clause was not violated.

I conclude this memorandum, reaffirming to the Honorable Court my opinion, based on the reasons, doctrines and law discussed, as to why the contract between CAVE and USOA does not constitute a transfer or a violation either of the franchise granted to CAVE by the Federal Executive of Venezuela or of the rights and obligations inherent or derived from that franchise.

(Signed) RAMON TENORIO S.

July 10, 1956.

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Supreme Court of the United States

October Term, 1957

No. 539

UNITED STATES OVERSEAS AIRLINES, INC., RALPH W. E. COX, JR., R. W. E. COX, LETITIA COX, co-partners doing business as Ocean Air Tradeways; and RALPH COX, JR., LETITIA H. COX, REBEKAH L. McSWEENEY and ANDREW L. COX, a partnership, doing business under the firm name and style of OCEAN AIR TRADEWAYS,

Petitioners,

against

COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA, S. A., AEROVIAS VENEZUELA EUROPA and JORGE MARCANO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Wigmore on Evidence (3d Ed., 1940) 7, 8

Supreme Court of the United States

October Term, 1957

No. .....

UNITED STATES OVERSEAS AIRLINES, INC., RALPH W. E. COX, JR., R. W. E. COX, LETITIA COX, co-partners doing business as Ocean Air Tradeways; and RALPH COX, JR., LETITIA H. COX, REBEKAH L. McSWEENEY and ANDREW L. COX, a partnership, doing business under the firm name and style of OCEAN AIR TRADEWAYS,

Petitioners,

against

COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA, S. A., AEROVIAS VENEZUELA EUROPA and JORGE MARCANO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 6, 1957, which affirmed the judgment of the District Court for the Southern District of New York entered on September 17, 1956, granting respondents a recovery of $153,234.53, plus interest and costs on their counterclaim against petitioners for breach of contract.

Opinions Below

The opinion of the Court of Appeals has been officially reported in 246 F. 2d 951. The opinion of the District Court has not been officially reported but is set out at App. Appdx.[1] 26-33.

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[1]The term "App. Appdx." as used throughout refers to the Appellants' Appendix as printed for the use of the court below.

Jurisdiction

The judgment of the Court of Appeals was entered on August 6, 1957. The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254.

Questions Presented

1. Where the outcome of litigation hinges upon expert testimony as to a disputed issue of foreign law, was a substantial restriction of petitioners' cross-examination of respondents' expert, whose testimony was adopted *in toto* by the trial court a denial of petitioners' right to a fair trial?

2. Did the Court of Appeals for the Second Circuit err in its holding that the "trial court's limitation on cross-examination was not prejudicial"?

Constitutional Provision Involved

The constitutional provision involved is the Fifth Amendment to the Constitution of the United States of America which provides: "No person shall be • • • deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of the Case

Petitioners are United States Overseas Airlines, Inc. (USOA), an American non-scheduled air carrier, and certain individuals doing business as a partnership named Ocean Air Tradeways (OAT).

On July 25, 1951, a contract was entered into between USOA and respondent Compania Aerea Viajes Expresos (CAVE), a Venezuelan air carrier which held franchises from the Venezuelan Government to engage in domestic air

transportation within Venezuela and international air transportation between Venezuela and certain points in Europe.[2]

Under this contract, which was to run for a period of one year, CAVE permitted USOA the exclusive use of its international franchise in consideration for certain payments by USOA. The contract was drafted by representatives of CAVE and gave USOA the exclusive right to conduct and control all air transportation operations over CAVE's international route. USOA was made responsible for conducting all flight operations, maintenance and traffic functions; providing all necessary personnel and establishing and maintaining maintenance bases and facilities; paying all costs, both direct and indirect; furnishing aircraft suitable for operations; establishing flight schedules and frequencies consistent with economically feasible traffic requirements; abiding by all applicable laws and government regulations; and otherwise conducting the operation at all times in such manner as to reflect credit upon the Venezuelan Flag. USOA was to receive all revenue but was obligated to pay CAVE certain stated sums plus a percentage of gross receipts over a specified minimum.

CAVE's international franchise[3] provided that all service personnel, 75% of administrative personnel and 50% of technical personnel were required to be Venezuelan citizens unless those percentages were reduced by the Federal Executive Power. The franchise further provided that CAVE might transfer and assign its rights and obligations under the franchise only to a Venezuelan corporation, the directors, capital and stockholders of which were to be "all Venezuelan in their majority of at least 55%"

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[2] Respondents' Exhibit "N," Appendix A, *infra*, at pp. 13-19. Respondent Marcano is the President and principal stockholder of CAVE.

[3] Respondents' Exhibit "BJ," Appendix B, *infra*, at pp. 20-24.

and that in no event should foreign companies or foreign governments participate in the enterprise.

Article 107 of the Venezuelan Constitution in effect on July 21, 1951 (App. Appdx. 490-2) provided:

> "No contract involving the national, state or municipal public welfare [interest] shall be made with foreign governments nor may such a contract be transferred in whole or in part to any foreign government, nor shall any contract be made with companies which are not domiciled in Venezuela, nor may there be transferred to such companies any contracts made with third parties."[4]

Shortly after USOA commenced flight operations, it discovered that traffic availability was not in accordance with representations made by CAVE's representatives prior to the execution of the agreement. Flight operations were not only economically unfeasible but were hampered by CAVE's failure to comply with obligations it had undertaken to perform under the contract. On the basis of these facts, petitioners commenced an action for recission. Respondents counterclaimed for breach of contract. Petitioners also alleged that the agreement was illegal and unenforceable both in its execution and performance under Venezuelan law, *i.e.*, it was in violation of (a) the international franchise and (b) the specific restrictions of the Venezuelan Constitution.

On trial, each of the parties introduced the testimony of an expert witness as to Venezuelan law. Petitioners' expert testified in substance that there were numerous and specified conflicts between the terms of the franchise and the provisions of the agreement between the parties (App. Appdx. 276-7, 282-3, 284-5). Petitioners' expert further testified that the agreement between the parties was invested with a *public interest* and thus in direct violation

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[4] It is not disputed that the franchise was endowed with the "public interest" (App. Appdx. 424, 491-2).

of the Venezuelan Constitution.[5] USOA was a company not domiciled in Venezuela, and since the Venezuelan Government could not directly contract with it when the subject matter involved the "public interest," the provisions of the Constitution could not be circumvented by permitting CAVE to transfer rights and obligations granted it by the Venezuelan Government.

CAVE introduced into evidence copies of letters in which it purportedly advised the Venezuelan Government of the provisions of its agreement with USOA and a letter written by the Venezuelan Minister of Communications to the Minister of Foreign Relations renewing its international franchise for a period of one year subsequent to July 30, 1951. Then respondents' expert testified that the agreement did not transfer any of CAVE's rights and obligations to USOA; that the agreement was neither in violation of CAVE's international functions or the Venezuelan Constitution (App. Appdx. 409-412, 421-426). The scope of cross-examination of respondents' expert witness was substantially curtailed by the trial court in sustaining numerous objections to questions asked by petitioners' counsel, the trial court effectively precluding the cross-examination of respondents' expert by a general ruling that "in the realm of expert opinion of foreign law the best you can do is to establish your expert's opinion, the other side has established its opinion, and it is a matter for the trier of the fact to decide which opinion it is going to take." (App. Appdx. 419.)

The trial court adopted in full the testimony of respondents' expert and relied solely upon that testimony in reaching all of its findings of fact as to the Venezuelan

[5] He also testified that the franchise, being one of "public interest," is not lawful and effective until approved by the Federal Executive Council of Ministers, communicated to the Congress, and the notice of granting is published in the Official Gazette (App. Appdx. 258, 264-265, 271-272, 273).

law and the effect of that law upon the legality of the agreement between the parties.[6] Having found the Venezuelan law to be precisely as stated by respondents' expert witness, the trial court concluded as a matter of law that plaintiffs had failed to sustain the burden of proving that the agreement was illegal or void (App. Appdx. 23).

Respondents were awarded judgment on their counterclaim against petitioners in the sum of $153,234.53 with interest from the 15th day of September, 1951, plus costs. When the question of the curtailment of petitioners' cross-examination of respondents' expert was presented to the Court of Appeals, that court held that the trial court's limitation of cross-examination was not prejudicial.

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[6] Findings of Fact: "62. The renewal of the franchise by the Federal Executive of Venezuela after receiving from CAVE the letters (1457) dated July 30, 1951 and August 14, 1951 and the oral information from Marcano, was a practical construction that the franchise and the law of Venezuela did not prohibit CAVE from making the agreement with plaintiffs dated July 25, 1951 and did not prohibit the acquisition by plaintiffs of CAVE's stock (Testimony of Tenorio)." App. Appdx. 17.

"63. Under Venezuelan law the agreement of July 25, 1951 did not accomplish a transfer of the rights and obligations of CAVE under the franchise (Testimony of Tenorio)." App. Appdx. 17.

"64. Under Venezuelan law the significant criterion in determining whether a transfer of rights and obligations under the franchise was made is whether control of the franchise rights was taken from CAVE, and the agreement between plaintiffs and CAVE dated July 25, 1951 keeps control in CAVE of 'matters of policy and questions of major concern,' and also reserves to CAVE control not only of 'hiring' and 'termination' of 'all personnel' but also the 'management' of 'all personnel' (Testimony of Tenorio)." App. Appdx. 17-18.

"66. Under Venezuelan law and the franchise USOA was not prohibited from acquiring stock in CAVE (Testimony of Tenorio)." App. Appdx. 18.

Reasons for Granting the Writ

The issues which this Court is asked to decide arise from the trial court's substantial restriction of petitioners' cross-examination of respondents' foreign-law expert and the determination by the court below that such restriction was not "prejudicial." We think the determination below was in conflict with the applicable decisions of this Court, in apparent conflict with the determination of other circuits on this issue, and that in the case at bar there is an important question of federal law which has not been, but should be, resolved by this Court.

I

The court below has decided an important question of federal law which has not been but should be settled by this Court.

To our knowledge, this Court has never authoritatively determined the nature and scope of permissible cross-examination of an expert witness as to a disputed issue of foreign law.

Petitioners are not unmindful of the existence of the so-called "Federal rule" regulating the permissible scope of cross-examination, and of its operationally limiting effect.[7] But regardless of how rigidly this rule may be applied in the discretion of a particular trial judge, it is axiomatic that

> "• • • it is only after a party has had an opportunity substantially to exercise the right of cross-examination that discretion [of the trial judge] becomes operative." *Lindsey* v. *United States* (C. A. D. C.), 133 F. 2d 368-369.

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[7] This "rule" has been roundly criticized. Wigmore on Evidence (3d Ed., 1940), §§ 1885 *et seq.*

Notwithstanding the foregoing, the "Federal rule" excepts from its application cross-examination of expert witnesses, and in such cases the cross-examiner is permitted wide latitude. See, *Carter Products* v. *Federal Trade Commission* (9 Cir.), 201 F. 2d 446, 452, vacated on other grounds, 346 U. S. 327.[8]

Petitioners contended before the trial court that the contract in suit was void *ab initio; i.e.*, it violated both the Constitution of the United States of Venezuela and the terms of the operating franchise which had been issued by the Venezuelan Government. This contention brought into issue a question of foreign law, and petitioners introduced expert testimony demonstrating that the contract illegally transferred rights and obligations of the franchise holder to a foreign corporation; hence the contract was void. On the other hand, in an attempt to offset petitioners' proof of the foreign law and to prove the foreign law applicable to their counterclaim, respondents introduced the testimony of an expert witness to the effect that the contract did not transfer the rights and obligations under the franchise and was therefore valid.

Despite the fact that the resolution of this disputed issue of foreign law went to the heart of respondents' counterclaim, the trial judge frustrated and prevented petitioners from exploring significant areas of cross-examination with respect to respondents' expert witness. The trial court's rationale for its curtailment of cross-examination was:

> "That where you are in the realm of expert opinion of foreign law the best you can do is to establish your own expert's opinion, the other side has established its opinion, and it is a matter for the frier of the fact to decide which opinion it is going to take." (App. Appdx. 419.)

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[8] See also: *Coca Cola* v. *Moore*, 246 Fed. 942 (8 Cir.); 37 Col. L. Rev. 1373, 1378, n. 33 (1937).

Having made its ruling and eliminated any possibility of discrediting the testimony of respondents' expert by cross-examination, the trial court concluded that petitioners had failed to sustain their burden of proving that the agreement was illegal and void, and made findings of fact which were based solely and expressly on the testimony of respondents' expert.[9]

Although the Court of Appeals stated that detailed disposition of the many issues raised on appeal did not seem of wide public interest to others than the immediate litigants, we think it clear that the permissible scope of cross-examination of respondents' expert was an important issue of federal law which should be resolved by this Court. This is the day of the expert. More and more litigation is concerned with technical questions susceptible of proof only through the use of experts. A mass of litigation turns entirely on the testimony of physicians, engineers, scientists and experts on foreign law.[10] In certain fields, *e.g.*, patent litigation, evidentiary presentations have been almost entirely abandoned to the expert. This ever-increasing dependency upon the expert witness has alarmed legal scholars[11] and has resulted in numerous proposals for reform.[12] For example, Professor Nussbaum, in a recent article in the Columbia Law Review, points out:

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[9] *Op. cit., supra,* ftn. 6.

[10] 9 *Unif. Laws Anno.* 428. In 1937 the National Commissioners on Uniform Laws estimated that the use of expert evidence had become an important and often controlling factor in 60% of important litigated business. The percentage today is undoubtedly higher.

[11] Wigmore on Evidence (3d Ed., 1940), § 563, p. 645, ftn. 2; 1936 *Reports, etc., New York Law Revision Commission,* p. 823, ftn. 107; XXXII Amer. Law Rev. 851 (1898); Learned Hand, Vol. 3, *N. Y. City Bar Ass'n. Lectures,* 89, 103-104 (1921); Learned Hand, 15 Harv. L. Rev. 40 (1902).

[12] 9 *Unif. Laws Anno.* 427 *et. seq.*; 1936 *Reports, etc., New York Law Revision Commission,* pp. 871-910 (Appendix thereto); Wigmore, *op. cit.* n. 11, *supra,* p. 650; 1938 *Report, ABA Comm. on Improvement of Law of Evidence.*

> "The unfavorable influence of a litigant's payment upon the expert's objectivity also constitutes the main argument of this general movement. In the case of an expert on foreign law * * * the need for a reform is even more urgent." [13]

Under these circumstances, it seems basic that expert witnesses should be subject to the broadest cross-examination possible. Yet in the case at bar, and in that area where cross-examination was most important, it was curtailed by the trial court. This Court has not yet defined the permissible scope of such cross-examination for the guidance of bench and bar. We believe that where the outcome of litigation hinges upon expert testimony as to a disputed issue of foreign law, the permissible scope of cross-examination of the expert witness raises an important issue of federal law, which has not been, but should be, resolved by this Court.

II

The court below has decided a question of federal law in a way in conflict with applicable decisions of this Court.

Despite the fact that the trial judge seriously interfered with and effectively curtailed cross-examination of respondents' expert, the Court of Appeals for the Second Circuit apparently determined that such curtailment of cross-examination was not prejudicial to petitioners' case.[14] Nevertheless, in *Alford* v. *United States*, 282 U. S. 687, this Court pointed out that:

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of

[13] 57 Col. L. Rev. 341, 351 (1957).

[14] 246 F. 2d 951.

> his inquiry does not in general apply. * * * It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." *Id.* at p. 692.

In the case at bar, respondents' counterclaim hinged upon the validity of the contract under Venezuelan law. The trial court's determination was based directly upon its total acceptance of the testimony of respondents' sole expert on the foreign law.

Clearly, where the outcome of the litigation is so obviously based upon the testimony of one witness, his credibility is a matter for the closest scrutiny and the scope of permissible cross-examination becomes an essential element in evaluating whether the parties were accorded a fair trial. Cf. *Gordon* v. *United States*, 344 U. S. 414, 417. In *Carter Products* v. *Federal Trade Commission* (9 Cir.), 201 F. 2d 446, vacated on other grounds, 346 U. S. 327, the Court pointed out:

> "More especially in the case of expert witnesses, cross-examination is of necessity exploratory and should be given broad latitude. Neither counsel nor the judge can know in advance what chinks may be disclosed in the armor of the expert or what frailties revealed in his premises." *Id.*, at p. 452.

Once the trial court had made its general ruling and had limited the scope of further cross-examination of respondents' expert, petitioners were effectively barred from ex-

ploring the credibility of that witness through cross-examination. Yet it was the testimony of that witness which the trial court relied on in making its determination awarding judgment to respondents on their counterclaim.

Accordingly, we think it clear (1) that the court below has decided a question of federal law in a way in conflict with the applicable decisions of this Court (see, *e.g.*, *Alford* v. *United States*, 282 U. S. 687) and (2) that the determination of the court below was in apparent conflict with the rulings of the Ninth Circuit in *Carter Products* v. *Federal Trade Commission*, 201 F. 2d 446, 452, 454 and *Fisher* v. *United States*, 231 F. 2d 99, 105, and further in apparent conflict with the ruling of the Third Circuit in *United States* v. *Augustine*, 189 F. 2d 587, 590-591.

CONCLUSION

By reason of the foregoing, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID I. SHAPIRO,
Attorney for Petitioners,
350 Fifth Avenue,
New York 1, New York.

DICKSTEIN, SHAPIRO & FRIEDMAN,
350 Fifth Avenue,
New York 1, New York,
of Counsel.

Appendix A

AGREEMENT, entered into as of the 25th day of July 1951 at Washington, District of Columbia, between Compania Aerea Viajes Expresos de Venezuela, S. A., having its principal place of business at Edificio Paris, Plaza Candelaria, Caracas, Venezuela (hereinafter called "CAVE"), and United States Overseas Airlines, Inc., having its principal place of business at Cape May County Airport, Wildwood, New Jersey (hereinafter called "Overseas").

CAVE is the holder of an open-end franchise granted by the Venezuelan Government to engage in air transportation between Venezuela and points in Europe. Until May 1951 passenger, property and mail operations were conducted over the route Caracas-Bermuda-Santa Maria-Lisbon-Madrid-Paris-Rome. These operations were temporarily suspended by CAVE in order that it might accept a desirable offer for the purchase of its aircraft. The objective of this agreement is to reestablish this service as hereinafter set forth.

Overseas currently operates under regulations of the Civil Aeronautics Board pertaining to so-called "Irregular Air Carriers". Among other equipment it owns, free and clear encumbrances, five DC-4 type aircraft suitable for the operation of the route here concerned. By letter proposal dated 19 July 1951 Overseas represented that it desired to enter into an agreement whereby it would immediately furnish two DC-4 aircraft and all personnel, equipment and facilities necessary to the conduct of such flight operations, maintenance and traffic, including ticketing and reservations.

In consideration of the mutual covenants existing between CAVE and Overseas, and the further considerations hereinafter specifically set forth, it is agreed as follows:

1) Overseas shall conduct all flight operations and maintenance and traffic functions, including ticketing and reservations, and accordingly shall:

A) Furnish, under terms and conditions legally permitting Venezuelan registry, two DC-4 aircraft suitable in all respects for the operation concerned. The Venezuelan Flag and CAVE markings shall be featured.

B) Immediately replace any aircraft to be removed from or otherwise not available for service for an appreciable time with an equally suitable aircraft.

C) Provide all necessary personnel.

D) Establish and maintain adequate maintenance bases and facilities. This may be accomplished directly or through contracts with existing services. The determination of locations for the conduct of maintenance and the provision of spare parts and engines shall be exclusively within the judgment of Overseas.

E) Conduct such program to train Venezuelan personnel as may be required by Venezuelan law. It is assumed that American crews may be used for at least the first year.

F) Pay to CAVE $1,500 per round trip flown. Trips covering only a part of the total route and off-route trips shall be at the rate of 12.233 cents per aircraft mile. Beginning 60 days from the date hereof, i.e., 23 September 1951, Overseas shall pay CAVE a minimum guarantee of $3,000 per week. Overseas shall exercise every reasonable and economically feasible effort to institute two round trips per week before the expiration of said 60 days. Payment shall be made at the end of each calendar month.

G) Pay promptly all costs both direct and indirect. Among others these will include operating, traffic, maintenance, taxes, commissions, employment reserves, promotional, accounting and administrative expenses. The President of CAVE shall be reimbursed by Overseas for actual business expenses and, subject to the attainment of an average annual load factor of not less than 50 percent,

shall also receive an annual salary of $15,000 per year. No other officer of CAVE shall be paid by Overseas unless so agreed in writing. Attorney fees to be included shall be limited to those applicable to the operation here concerned. It is estimated that these may equal approximately $20,000 per year.

H) Pay to CAVE 50 percent of all gross revenues in excess of $2.25 per revenue aircraft mile averaged over periods of three consecutive months. All such revenues up to and including $2.25 per revenue aircraft mile to be retained by Overseas.

I) Grant to CAVE an option to purchase those DC-4 aircraft used in the operation for a total price of $500,000 each, such option to be exercisable only if Overseas decides to discontinue its participation in such operations as defined in this agreement. J. M. R. C. Jr.

J) Establish flight schedules and frequencies consistent with traffic requirements. It is assumed that this will initially involve two round trips per week.

K) Abide by all applicable laws and government regulations and otherwise conduct the operation at all times in such manner as to reflect credit on the Venezuelan Flag.

2) CAVE shall:

A) Grant to Overseas a one year option to buy 25 percent of the total authorized outstanding stock of CAVE. The purchase price shall be $1,500 per share. As there are a total of 600 shares authorized and outstanding the option shall provide for 150 shares at a total cost of $225,000. The President of CAVE shall exercise his best efforts to make available up to 90 additional shares, or a total of 40 percent, under the same terms should Overseas so desire. In any event it is understood and agreed he shall not relinquish

his personal holdings below 51 percent. Should Overseas exercise its option, it is agreed that the tangible assets and liabilities then held by CAVE will be segregated and set aside so as to be excluded from participation by the stock interest thus conveyed to Overseas.

B) Maintain arrangements for traffic and landing rights, assist in the negotiations of Government contracts, take such actions as may be necessary in connection with continuing the franchise concerned and furthering diplomatic relations of consequence thereto.

C) Delegate to Overseas primary responsibility for the hiring, management and termination of all personnel but with the right reserved to CAVE to make final overriding decision when deemed in the best interest of the Company.

3) It is mutually agreed that:

A) The operation concerned shall be activated as soon as possible and in any event not later than 15 August 1951.

B) Matters of policy and questions of major concern relating to the conduct of the operation will be determined and carried out in accordance with properly adopted decisions of the Board of Directors of CAVE.

C) The system of accounting shall be established by a qualified accounting firm, the books shall be continuously open to both CAVE and Overseas and customary periodic statements and balance sheets shall be issued as certified to by a mutually acceptable Certified Public Accountant.

D) No indirect compensation, rebates or "kick-backs" will be accepted by CAVE or Overseas or any of the personnel connected directly or indirectly with either.

E) All references to money refer to United States currency. Payment may in any case be made in Venezuelan currency based upon the then existing legal rate of exchange.

F) No assignment of this agreement, or any rights thereunder, by either party shall be valid without the written consent of the other.

G) This agreement shall continue in force and govern all transactions between the parties hereto for a period of one year from the date hereof. It shall be renewable upon the mutual agreement of both parties.

H) The validity and interpretation of this agreement shall be governed by the law of the District of Columbia.

Date: 28 July 1951

COMPANIA AEREA VIAJES EXPRESOS
By JORGE MARCANO
Jorge Marcano, President

Date: 25 July 1951

UNITED STATES OVERSEAS AIRLINES, INC.
By RALPH COX, JR.
Ralph Cox, Jr., President

APPENDIX No. 1 TO CAVE—UNITED STATES OVERSEAS AIRLINES, INC. AGREEMENT OF 25, JULY, 1951.

United States Overseas Airlines, Inc., as referred to and wherever referred to in this agreement shall include and be binding upon Ocean Air Tradeways, a co-partnership, as though the references in each instance specifically referred to in and included such co-partnership.

Dated 25, July 1951

UNITED STATES OVERSEAS AIRLINES, INC.
by: RALPH COX, JR.
Ralph Cox, Jr., President

Dated 25, July, 1951

OCEAN AIR TRADEWAYS
by: RALPH COX, JR.
Ralph Cox, Jr., Principal Partner

Dated 28, July, 1951

COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA S.A.
by: JORGE MARCANO
Jorge Marcano, President

August 3, 1951

It is understood that contract dated July 25, 1951, between U.S.O.A. and C.A.V.E. shall be rewritten to the extent that paragraph numbered 2-C is omitted and paragraph 2-D is renumbered 2-C.

Said contract will then be immediately filed under Section 412 of the Civil Aeronautics Act. Pending action a board of arbitration consisting of Ralph Cox, Jr., Jorge Marcano and a member mutually acceptable to each will be established to settle any disagreements that may arise in connection with the operation of A.V.E.

Upon approval of said 412 application, an application will be filed with the Civil Aeronautics Board requesting approval of Ralph Cox, Jr. or a nominee to serve as a director and a vice president of C.A.V.E. Should approval be denied, the aforementioned board of arbitration will continue in effect for the duration of said contract.

AGREED:

RALPH COX, JR.
JOHN MARSHALL, Attorney in fact
C.A.V.E.

Appendix B

TRANSLATION

BETWEEN the Federal Executive of the United States of Venezuela, represented by the citizen Lt. Col. Oscar Mazzei, Minister of Communications, duly authorized by the Junta Militar of the Government and with the approval of the Cabinet, as one party, and as to the other party, the citizen Jesus Salazar, of age, resident of this city, in his capacity of Manager of CAVE (herein called "The Contractor"), have entered into the contract contained in the following clauses:

FIRST: The Federal Executive authorizes The Contractor to exploit in the country, in accordance with the present contract and subject to the Law of Civil Aviation and its regulations and subject to the other applicable laws and regulations, and without prejudice to third parties, a public aviation transportation company for the transport of passengers and cargo and for flights for advertising, sanitary, agricultural and scientific purposes, and to perform all kinds of civil and commercial acts related to the purposes above mentioned, only through the express [non-scheduled] flights. Upon application and justification by The Contractor for the need of the service, the Federal Executive may authorize scheduled flights in certain and determined regions of the country.

SECOND: The duration of the contract will be for one year from its date, to be extended at the option of the Federal Executive, The Contractor being obliged to accomplish regularly the flights which it has undertaken, and it being understood that if six months elapses without activity by The Contractor, this contract will be rescinded automatically.

THIRD: During the term of the contract the aircraft in the service of the company and owned by the company will pay in the civil airports the respective charges for their use and the use of their installations.

FOURTH: In addition to the rights and privileges accorded the Federal Executive and Government aircraft, aircraft belonging to companies created by the Federal Government, be they autonomous entities or otherwise, and belonging to mixed companies, created in accordance with Paragraph 2 of Article 84 of the Law of Civil Aviation, will have the right during the life of this contract to the friendly use of the airports owned, administered or enjoyed by The Contractor or his company, and also to the lighting service, radio-telegraph, radio-telephone and meteorology of the same.

FIFTH: The employees of the company must be Venezuelans; the administrative personnel at least 75% Venezuelan; the technical personnel at least 50% Venezuelan. When it is impossible for the company to comply with these requisites by reason of scarcity of Venezuelan technical personnel, the Federal Executive may reduce the Venezuelan percentage in a duly proven case.

SIXTH: The Contractor agrees to use in its activities, for training purposes, in accordance with the specialties and with the compensation established by The Contractor and on the conditions and periods to be determined by the Ministry of Communications, with due consideration to the ordinary possibilities of the company, Venezuelans who have finished their studies as pilots, mechanics or air radio operators.

SEVENTH: All of The Contractor's aircraft must carry a duly qualified Venezuelan co-pilot.

EIGHTH: The Federal Executive will exempt The Contractor during the one year life of this contract from 75% of the custom duties on importations relating to the flight material and other products that it imports through the ports and airports of the country, for the exclusive use of the company and in accordance with its ordinary activities, such as instruments, tools, paints and varnishes, up to a total of 1,000 kilograms per year, hanger equipment and spares for airplanes, and motors, radio communication equipment, aircraft engines and material destined for their manufacture, fuel and lubricants and machine shop machinery, the above items being examples but not a limitation, provided The Contractor complies with the laws and regulations on this matter. To understand that this exemption is applicable only on material and tools which are not regularly produced or manufactured in country.

NINTH: The Contractor will grant to the Federal Executive, for passengers and cargo transported for the account of the Federal Public Administration, either of the Executive departments or of institutes and autonomous organizations or any other branches or national services a discount of not less than 15% of the price established by the respective tariffs. The same discount will be granted to the Governments of the States of the Union of the Federal District and of the Federal Territory. Similarly, The Contractor will, if entrusted with the transportation of mail, transport free of charge up to 6 kilograms of official mail on each trip.

TENTH: In the event the company decides and is able to extend its services outside Venezuelan jurisdiction, it will obtain previous authorization of the Federal Executive.

ELEVENTH: In addition to the advantages given by The Contractor to the Federal Government and its branches as

per clause NINTH, The Contractor will give preference in its services to transportation requested by the Public Administration up to 50% of the capacity of the plane used on the respective routes.

TWELFTH: The company will not be charged with national taxes that may affect it in a special way, but will be subjected to payment of all the taxes, contributions and services of general nature with the exception of the exemptions granted in this contract.

THIRTEENTH: The Contractor may transfer the rights and obligations arising under this contract, with prior approval of the Ministry of Communications, only to a Venezuelan company whose Directors, capital and shareholders are Venezuelan in a majority of at least 55%. The respective shares will be nominative and in no case will foreign companies or governments participate in the company.

FOURTEENTH: The Federal Executive reserves at all times by means which it judges proper, the right to inspect and control the destination and use of the materials and objects which, in accordance with clause EIGHTH, are imported free of duties, and the company agrees to keep a registry, also subject to the inspection and control mentioned, on which will be specifically shown the entries and discharges.

FIFTEENTH: So as to insure the Federal Executive against any damage or harm which the company may incur during its activities, and without excluding major responsibilities, The Contractor will post a bond in the name of the Minister of Communications in this city to the amount of 30,000 bolivars.

SIXTEENTH: Finally, and in order specially to insure the Federal Executive of strict compliance with the obligations arising under this contract and without excluding major responsibilities, The Contractor will post bond to the satisfaction of the Federal Government in this city to the amount of 20,000 bolivars.

SEVENTEENTH: Doubts or controversies of any nature which may arise under this contract and which cannot be solved in friendly fashion by the contractors, will be determined by the corresponding tribunals of Venezuela, in accordance with its laws and without giving rise to any foreign claims.

EIGHTEENTH: The Federal Executive will notify the National Congress of this contract. As agreed, we sign in duplicate in Caracas, July 31, 1950.

Sgd. Oscar Mazzei
TTE. CNEL. OSCAR MAZZEI
MINISTRO DE COMUNICACIONES

Sgd. Jesus Salazar
JESUS SALAZAR
Gerente

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 539

UNITED STATES OVERSEAS AIRLINES, INC., RALPH W. E. COX, JR., R. W. E. COX, LETITIA COX, co-partners doing business as Ocean Air Tradeways; and RALPH COX, JR., LETITIA H. COX, REBEKAH L. MCSWEENEY and ANDREW L. COX, a partnership, doing business under the firm name and style of OCEAN AIR TRADEWAYS,

Petitioners,

against

COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA, S. A., AEROVIAS VENEZUELA EUROPA and JORGE MARCANO,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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Of Counsel.

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OPINIONS BELOW

The per curiam opinion of the Court of Appeals (Clark, C. J., Chase, J., and Hincks, J.) is reported in 246 F. 2d 951 and is printed as an appendix to this brief (pp. 17-19). The opinion of the District Court (Palmieri, J.) is not officially reported but appears at PA 26-33.*

* References are to the appendices and Exhibits below: "PA": plaintiffs-appellants' appendix; "DA": defendants-appellees' appendix; and "Ex.": Exhibits.

QUESTIONS PRESENTED

1. Whether in conducting a non-jury trial the District Court abused its discretion by its rulings on questions asked on cross-examination of an expert on foreign law.

2. Whether petitioners were prejudiced by the rulings of the District Court.

STATEMENT

Introduction

This action involves a written agreement between respondent Compania Aerea Viajes Expresos de Venezuela (herein called "CAVE"), holder of a franchise for air transportation between Venezuela and Europe, and petitioners. Petitioners agreed to conduct certain flights under the franchise for one year. After only one round trip petitioners decided that they would "make more money" by using their aircraft on the "Korean airlift," necessitated by the Korean conflict. They therefore deliberately breached the agreement.

As a defensive maneuver, petitioners immediately sued for rescission, claiming that defendants had by fraud induced petitioners to contract. Respondent counterclaimed for damages for breach of contract.

The District Court, sitting without a jury, found (PA 5-33) that respondents had committed no fraud that the agreement was valid, and that petitioners ha

willfully breached. Damages of $153,234.53, with interest, were awarded respondents.

Petitioners appealed, asserting a myriad of errors. Respondents also appealed, contending that the damages allowed were insufficient. The Court of Appeals affirmed in a short per curiam opinion, stating that "detailed disposition of these many issues does not seem of wide public interest to others than the immediate litigants" (*infra* p. 17, 246 F. 2d 952).

The Facts

CAVE held and had operated from January, 1950 to May, 1951 a Venezuelan franchise permitting air transportation between Venezuela and Europe (Ex. 357; PA 108-111). However, CAVE found that it had inadequate working capital to conduct the operation itself (PA 111, 148-149), and in May, 1951 determined to sell its aircraft, and seek arrangements for operations through a substantial carrier such as petitioners (PA 108-109; Ex. 357).

From third parties petitioners soon learned of CAVE's need for an operating arrangement (DA 4-5). They had hired two or three former CAVE employees (PA 93), who told petitioners that CAVE's route had a good potential not previously realized because of poor management (DA 74-75, 9-11). Before they had any contact with respondents, petitioners determined that CAVE's route was extremely lucrative (DA 4-11, 111; Ex. C). They then besieged respondents with telephone calls and written communications seeking an agreement (Ex. D, E, F; PA 335).

On July 25, 1951 the parties entered into a written agreement (Ex. N; Appendix A to the petition). By Paragraph 1 of the agreement petitioners agreed, in substance, to conduct flight operations, furnish aircraft and personnel, train Venezuelan personnel as required by Venezuelan law, make certain payments to CAVE, and to "abide by all applicable laws and government regulations."

By Paragraph 2 of the agreement CAVE agreed, in substance, to maintain traffic and landing rights, continue the franchise, further diplomatic relations, and delegate to petitioners primary responsibility "for the hiring, management and termination of all personnel but with the right reserved to CAVE to make final overriding decisions when deemed in the best interests of the Company."

By Paragraph 3 of the agreement it was mutually agreed, in substance, that "matters of policy and questions of major concern relating to the conduct of the operation will be determined and carried out in accordance with properly adopted decisions of the Board of Directors of CAVE," and that the contract would continue for one year.*

After only one round trip petitioners decided that "it didn't look like so much money was going to be made"

* An addition dated August 3, 1951 omitted a paragraph giving petitioners the right to name a member of CAVE's Board of Directors, and provided that, pending approval by the Civil Aeronautics Board of petitioners' director, a Board of Arbitration consisting of the president of CAVE, the president and principal partner of petitioners, and a mutually acceptable third member would settle disagreements as to the operation.

on the operation, and they thought "they would make more money on the Korean airlift" (DA 113). They therefore deliberately and wantonly breached the agreement, telephoning their pilot in Europe to take the aircraft off the operations and strand passengers in Europe (PA 73; DA 59; Ex. 351).

The District Court made detailed findings (PA 5-25) rejecting all claims of petitioners. The Court's opinion stated that "There is no question of the plaintiffs' willful refusal to continue performance under the contract" (PA 29), that "the Korean airlift, necessitated by military actions in Korea, offered the plaintiffs certain prospect of quick profits without comparable risk, and apparently affected the plaintiffs' decision to abandon this enterprise" (PA 27), that CAVE's franchise was valid under Venezuelan law (PA 31), and that respondents were entitled to damages (PA 30-33).

The Trial

Petitioners' contentions at the trial were obvious afterthoughts to escape payment of damages. They attempted to introduce vast amounts of evidence on what the District Court termed "extraneous, cumulative and irrelevant matters" (PA 144-145), and engaged in an "endless exploration of irrelevant minutia" (PA 208). One of petitioners' afterthoughts (not even in the pleadings) was that the agreement between the parties was illegal under Venezuelan law. The Court rejected this argument with careful findings (PA 15-18).

Petitioners' claimed that the agreement was "illegal" because it somehow accomplished a "transfer" to petitioners of "the rights and obligations" of the Venezuelan franchise, in violation of the terms of the franchise and of the Venezuelan Constitution*. The contention was on its face meritless. The agreement gave no franchise rights to petitioners, but made them agents of respondents for certain purposes. CAVE retained the franchise and the right to make "overriding" decisions with respect to the "hiring, management and termination of all personnel" and maintained control over all "matters of policy and questions of major concern relating to the operation" (Ex. N).

Moreover, petitioners made no showing that the operations under the agreement were likely to have been prohibited by the Venezuelan government. Since all governmental powers in Venezuela were vested in the Federal Executive (PA 436, 412), it alone could have prohibited those operations (PA 17). It did not even hint that it would do so. On the contrary, petitioners conducted flights without any interference or question by the government, which was made aware of all the significant terms of the agreement, both in writing (Ex. BL, BM) and orally (PA 432-433). Indeed, with this

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* The petition's misquotation (p. 4) of the franchise, to read "in no event should foreign companies participate in the *enterprise*" (rather than "company"), gives the impression that the franchise prohibited any stock ownership or other participation in CAVE. But the experts for both parties testified, and the franchise manifestly means, that the prohibition against "participation" related only to a company to whom CAVE "transferred" the franchise (PA 267, 270, 421).

awareness, the government renewed CAVE's franchise (Ex. BN) and asked foreign countries for a renewal of landing rights (Ex. BD).* There could be no more explicit or practical construction that the agreement was valid.

Petitioners did not submit the testimony of a Venezuelan lawyer, undoubtedly because they could obtain none to support their contention. Their expert was a Spanish lawyer (PA 256), who had looked up Venezuelan law for the case (PA 258).

Respondents submitted the testimony of a Venezuelan lawyer (PA 408). It is with respect to rulings on the cross-examination of this witness that petitioners now claim that error was committed. Petitioners' chief objection in the Court of Appeals on the point was that the Court sustained an objection to a hypothetical question. Petitioners' counsel had laid no foundation for the question (PA 414-416). The question assumed that the language of the agreement giving CAVE "control" of the management of personnel and matters of policy and major concern was a "sham" (PA 414-415), and asked whether a Venezuelan court would "pierce the sham" (PA 415). The District Court, while indicating that he knew full well that any "sham" could be pierced (PA 414-415), said that no proper foundation had been laid for the hypothetical question, since there was no proof that the retention of control was a sham (PA 415). Petitioners never submitted any proof, either

* The Venezuelan government had also been informed in 1950 of the agreement CAVE had with two other American companies, similar to the agreement with petitioners (PA 446).

through the testimony of their own expert, or in the memorandum of Venezuelan law which the Court permitted their expert to submit (DA 47-48), or otherwise, tending in any way to prove the assumption which petitioners' counsel made.* The Court explained to petitioners' counsel the lack of foundation for the hypothetical question and pointed out that counsel could lay that foundation in one question (PA 415). Yet counsel did not do so.

To say, as the petition does (p. 5), that the District Court sustained "numerous objections" to questions asked on cross-examination, thus "effectively precluding the cross-examination," is inconsistent with the record. Petitioners' counsel's examination of the witness extends over seventeen printed pages (PA 412-428). In this Court the petition does not set forth a single question to which an objection was sustained, but contents itself with tearing from context certain language of the District Court in a colloquy with petitioners' counsel. The substance of the entire statement of the Court, from which language is taken out of context, was that petitioners' counsel was being repetitive (PA 419). To only four questions did petitioners' counsel fail to obtain an answer. Only two such questions were set forth as error in petitioners' brief below, the question above dis-

* Indeed, although the District Court participated actively in the examination of petitioners' expert in an effort to clarify his position, the witness never suggested that the provision for retention of control was inoperative. His position was that, giving effect to all provisions of the agreement, CAVE had "transferred" the rights and obligations of the franchise, leaving CAVE with no substantial rights (PA 277).

ussed and another which was both bad in form and epetitive (PA 424).*

There was no dispute between the parties as to the evidentiary facts on which the question of Venezuelan law turned. There was no controversy as to the terms of the agreement, or the language of the franchise, or indeed any provision of Venezuelan law. Only the conclusion to be drawn by the Court from the uncontroverted facts was in dispute. The day after respondents' expert had testified, petitioners' expert was recalled by petitioners and restated his conclusions at length (PA 490-496). He later reiterated his opinions in his written memorandum (DA 47-48). Yet he never said that the provision in the agreement giving CAVE "control" was a "sham."

The Court of Appeals' Opinion

The per curiam opinion of the Court of Appeals (Clark, C. J., Chase, J. and Hincks, J.), in affirming the judgment, stated that "Since detailed disposition of these many issues does not seem of wide public interest to others than the immediate litigants, we shall rely on the trial judge's extensive findings and opinion for exposition of the facts and content ourselves with merely

* The witness had stated at least six times that, although no transfer of the "rights and obligations of the franchise" could be made to petitioners, no such transfer had been accomplished by the agreement. Petitioners' counsel asked again whether the franchise could "be the subject of an assignment in part" to petitioners (PA 424). The answer was obvious and there was no gain in having the witness state it for a seventh time.

indicating the ground upon which we affirm each point raised by the parties in their respective briefs" (*infra* p. 17, 246 F. 2d 952). The only comment of the Court of Appeals on the issue raised by the petition in this Court was: "the trial court's limitation on cross-examination was not prejudicial" (*infra* p. 18, 246 F. 2d 952).

ARGUMENT

I. The decision below is clearly correct.

The decision below is clearly correct. In the first place, as the Court of Appeals held, the rulings of the District Court could not have been in the slightest degree prejudicial. The belated contention that the agreement was invalid under Venezuelan law was on its face meritless. The significant terms of the agreement between the parties were made known to the Venezuelan government, and by renewing the franchise and seeking renewal of foreign landing rights the Venezuelan government construed the agreement as valid. Even examined theoretically and with hindsight, the agreement is plainly, as the Court of Appeals stated, one of "agency," rather than a "transfer of rights and obligations."

The evidentiary facts on which to base a conclusion as to Venezuelan law being undisputed, the conclusion was one of law for the Court. *Merinos Viesca y Compania* v. *Pan American P. & T. Co.*, 83 F. 2d 240, 242 (2d Cir. 1936) ("It is the duty of the trial judge to use his own judgment and find the meaning of the foreign law as he would if the meaning to be ascer

tained were that of a deed or an agreement"); *Jansson* v. *Swedish American Line*, 185 F. 2d 212 (1st Cir. 1950); *cf. Finney* v. *Guy*, 189 U. S. 335 (1902); *Eastern Bld'g & Loan Association* v. *Williamson*, 189 U. S. 122 (1902). The District Court reached its conclusion and made meticulous findings as to Venezuelan law after consideration of all the undisputed facts, as well as the memoranda of both experts (DA 47, 131-139).* Petitioners have failed to sustain their burden of showing that prejudice resulted. *Palmer* v. *Hoffman*, 318 U. S. 109, 116 (1943). It can hardly be supposed that the Court would have reached a different conclusion if the excluded questions of petitioners' counsel had been answered. See *United States* v. *Borden Co.*, 347 U. S. 514, 516 (1954).

As significant in showing lack of prejudice from the exclusion of evidence, the cases point to factors such as: that the appellants' expert could testify to the facts and opinions in issue, *Frank R. Jelleff, Inc.* v. *Brazen*, 233 F. 2d 671 (D.C. Cir. 1956), that the objecting party was allowed to submit a brief setting forth its conclusions, *Cintron Riviera* v. *Bull Insular Line*, 164 F. 2d 88, 91 (1st Cir. 1947), and that the trial judge, sitting without a jury, indicated that he would attach little weight to the excluded testimony, *Mutual Life Ins. Co. of New York* v. *Frost*, 164 F. 2d 542 (1st Cir. 1947). All these factors were present in this case. It is incon-

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* The statement in the petition (p. 5) that the District Court "relied solely" upon the testimony of defendants' expert witness as to Venezuelan law is inaccurate, as a reading of the findings will show (PA 15-18).

ceivable that any prejudice occurred to petitioners. To inflict on respondents "the monstrous penalty of a new trial," 1 Wigmore, Evidence, 3d Ed. 1940, §21, on the basis of this record would be unfair in the extreme.

In addition, as set forth above, the rulings of the District Court were with respect to questions which were patently improper. A District Court has, particularly in a non-jury case, wide discretion in the conduct of the trial and the extent of the cross-examination. Cf. *Glasser* v. *United States*, 315 U. S. 60, 83 (1942) (criminal case); *Burns* v. *United States*, 287 U. S. 216, 222-223 (1932) (same). In a non-jury case, where the evidentiary facts are not in dispute and where the trial court has the benefit of written memoranda setting forth the opposing conclusions of the witnesses as to foreign law, it would be strange to withhold discretion from the District Court in controlling the examination of those witnesses. A reading of the examination in question demonstrates that the District Court acted well within sound discretion (PA 408-428).

II. There is no important question of federal law.

Petitioners claim (p. 7) that in the individual facts of this litigation there lurks an important question of federal law, namely, the permissible scope of cross-examination of technical experts. No such question is involved. The decision of the Court of Appeals was merely that the District Court's rulings were not "prejudicial." Surely the determination that in the particular circumstances of this case no prejudice occurred to peti-

tioners presents no important question of federal law which requires resolution by this Court. The Court of Appeals' opinion as to lack of prejudice is hardly a precedent in any other case.

The petition attempts to analogize this litigation to cases involving technical matters susceptible of proof only through physicians, engineers or scientists (p. 9). There is no fair analogy, for in such cases the litigation hinges on conclusions which only a scientific or medical expert can draw. Here, there was no dispute as to any relevant fact, document or provision of Venezuelan law, and the question was not one of fact at all, but rather one of law, which the Court was required and fully competent to decide.

Finally, even if the question asserted by the petition had been presented, there is no indication that the federal courts are in doubt as to its answer. The extent of cross-examination must inevitably be largely within the discretion of the trial court if there is to be a fair administration of justice. The Court of Appeals for the Second Circuit has not indicated any propensity to allow the District Courts in that circuit to depart from those criteria which have long been followed in the federal courts as marking the permissible limits of that discretion.

III. There is no conflict of decision.

The petitioners assert (p. 12) that the decision below is "in a way in conflict" or "in apparent conflict" with four cases. A reading of those cases shows that no conflict is presented. *Alford* v. *United States*, 282 U. S.

687 (1931), was a criminal case in which a witness gave key testimony as to uncorroborated conversations, yet cross-examination to discredit the witness before the jury and to show where he resided and that he was in custody of federal authorities was cut off. *Fisher* v. *United States*, 231 F. 2d 99 (9th Cir. 1956) was also a criminal case where the witness, offered as an "expert" on Communism, gave critical testimony that he had seen defendant at a Communist meeting. The trial court did not allow cross-examination to show bias because of payment for the testimony or to show prior false identifications of Communists. *Carter Products* v. *Federal Trade Comm'n*, 201 F. 2d 446 (9th Cir. 1953), vacated on other grounds, 346 U. S. 329 (1953), was a case where a Federal Trade Commission examiner so unfairly restricted cross-examination of doctors who testified for the Commission as to foreclose any "inquiry into matters bearing materially" on crucial direct testimony. For example, a doctor was qualified as a gastroenterologist and radiologist and gave testimony in both capacities on direct. The examiner restricted the cross-examination to questions on radiology and yet refused to strike the testimony on direct pertaining to gastroenterology. *United States* v. *Augustine*, 189 F. 2d 587 (3d Cir. 1951), involved a prosecution for income tax evasion. There the cross-examination of a "devastating" witness as to "the heart of the case" for the prosecution was so restricted that there could be no exploration of the witness' credibility on the critical point of the case.

Conclusion

The issues involved in this litigation lay bare no considerations which in the exercise of discretion would warrant the granting of a petition for certiorari under the Court's Rule 19. It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Before:

CLARK, *Chief Judge*, and
CHASE and HINCKS, *Circuit Judges*.

Per CURIAM:

This appeal involves the interpretation and validity of a written agreement made by the parties covering air carrier operations. Plaintiffs were nonschedule carriers and the owners and operators of aircraft, two of which were to be used under the agreement for the purpose of exploiting a franchise held by defendant CAVE from the Venezuelan Government for trans-Atlantic flying. In this action brought in a federal court because of the diverse citizenship of the parties, both litigants claimed breach of the agreement. Judge Palmieri, sitting without a jury, made findings holding defendants entitled to damages because of plaintiffs' breach, but declining to give defendants as large a judgment on their counterclaim as they had sought. Both sides appeal, raising a variety of questions, including fraud, invalidity, and damages. We agree with the judge's disposition of the issues, although we do not adopt all his reasons. Since detailed disposition of these many issues does not seem of wide public interest to others than the immediate litigants, we shall rely on the trial judge's extensive findings and opinion for exposition of the facts and content ourselves with merely indicating the ground upon which we affirm each point raised by the parties in their respective briefs.

1. *Discussing USOA's Points of Law.* (1) The findings as to lack of fraud and lack of reliance thereon by USOA are not clearly erroneous; (2) the contract was not illegal

because it was an agency contract, rather than a "transfer of rights and obligations"; (3) the trial court's limitation on cross-examination was not prejudicial, and the other evidentiary rulings were correct; (4) there was sufficient evidence to support findings that CAVE was not in breach when USOA breached, and CAVE remained ready and willing to perform subsequently—its only duty under New York law, *DeForest Radio Telephone & Telegraph Co.* v. *Triangle Radio Supply Co.*, 243 N. Y. 283, 153 N. E. 75; (5) since the option to purchase plaintiffs' aircraft was not a remedy, it was not the exclusive remedy for breach. Nor was there an election of one remedy or a forfeiture of others on these facts. We agree with the trial judge's construction of the minimum guarantee of $3,000 per week as applicable, whether or not USOA chose to continue flights. There could be anticipatory breach of this contract under New York law because it was one for the payment of money, as well as for the performance of services; and USOA concedes the propriety of finding anticipatory breach of contracts to pay money. The award of damages to defendants, based on this minimum guarantee, plus out-of-pocket expenses and less a small offset for nonperformance by defendants of a collateral agreement, is therefore justified.

2. *Discussing CAVE's Affirmative Points of Law*: (1) CAVE failed to carry its burden of showing that it was ready and willing to perform its part of the option contract to purchase the aircraft, and consequently it cannot obtain damages for USOA's anticipatory repudiation. 4 Corbin on Contracts §§962, 977, 978 (1951). (2) CAVE also failed to meet its burden of proving that USOA's breach was the proximate cause whereby it lost its franchise. The Venezuelan Government explained the loss in

terms of nonflying and noncompliance "with the requirements stipulated by the National Technical Board of Aeronautics, in connection with the application of • • • [CAVE] to operate international air transportation services." These requirements were neither explained nor linked to USOA's breach. Consequently the court's refusal to award CAVE damages based on these items was not error.

Affirmed.